FILED

No. 94-1476 MAR 6 1995

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1994

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

LARRY L. SIMMS
THOMAS G. HUNGAR
Gibson, Dunn & Crutcher
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5306
(202) 955-8500

KAREN I. WARD
Owens-Corning Fiberglas Corporation
Building 53
2790 Columbus Road, Route 16
Granville, Ohio 43023-1200
(614) 321-5814

ANNE E. COHEN
(Counsel of Record)
JONATHAN E. RICHMAN
ROBERT D. GOODMAN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Petitioner

March 6, 1995

QUESTIONS PRESENTED

1. Whether the $7.5 million award of punitive damages, which is many times larger than respondents' compensatory damage awards and has been assessed against a defendant subject to many punitive damages lawsuits in many jurisdictions for the same course of conduct, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. *See BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting certiorari to consider excessiveness of punitive damages award under Due Process Clause).

2. Whether the Due Process Clause prohibits a state court from circumventing constitutional limits on its jurisdiction by using a state procedural rule to conscript a corporate defendant — on pain of substantial sanctions — to compel specified employees to travel to the State and appear as witnesses in a civil trial, where the designated employee-witnesses lack minimum contacts with the forum State and therefore are beyond the state court's jurisdictional power.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglass Industries, Ltd.
Arabian Fiberglass Insulation Company
Asahi Fiber Glass Company, Ltd.
Fiberglas Colombia, S.A.
Polyplaster, S.A.
Scandinavian Glasfiber AB
Vitro-Fibras, S.A.

All parties to the appeal in the Appellate Court of Illinois are listed in the caption of this petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION AND RULE INVOLVED 2

STATEMENT OF THE CASE 3

A. Preservation of Constitutional Issues 4

B. Sanctions Under Illinois Supreme Court Rule 237(b) 4

C. Sanctions Relating to Owens-Corning's Net Worth 7

D. Punitive Damages Jury Charge and Awards 8

Page

REASONS FOR GRANTING THE WRIT 10

I. THE $7.5 MILLION PUNITIVE DAMAGES JUDGMENT IS GROSSLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE AND THE FACTORS PRESENTED IN THE *BMW* CASE 12

A. Relationship Between Punitive and Compensatory Damages 13

B. Existence of Other Punitive Awards for the Same Course of Conduct 15

C. Relationship to Other Punitive Awards for the Same Course of Conduct 17

D. Additional Considerations Indicating Excessiveness 19

II. THE ILLINOIS COURTS' APPLICATION OF RULE 237(b) VIOLATES THE DUE PROCESS CLAUSE 23

A. A State Court May Not Coerce a Private Party to Do What the Court Itself Cannot Do 24

Page

B. This Court's Review Is Necessary to Resolve this Important Constitutional Issue and to Prevent Rampant Litigation Abuse Threatening Recurrent Deprivations of Constitutional Rights 26

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Page

Adcock v. Brakegate, Ltd., 247 Ill. App. 3d 824, 617 N.E.2d 885 (1993), *aff'd*, 1994 Ill. Lexis 156 (Ill. Nov. 23, 1994) 27

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 24

Baine v. General Motors Corp., 141 F.R.D. 332 (M.D. Ala. 1991) 6

Barrows v. Jackson, 346 U.S. 249 (1953) 24, 26

Bluestein v. Upjohn Co., 102 Ill. App. 3d 672, 430 N.E.2d 580 (1981) 28

BMW of North America, Inc. v. Gore, 115 S. Ct. 932 (1995) . . . . . *passim*

Calder v. Jones, 465 U.S. 783 (1984) 25, 26

Dunn v. HOVIC, 1 F.3d 1371 (3d Cir.) (in banc), *cert. denied*, 114 S. Ct. 650 (1993) 15, 18, 19

Fopay v. Noveroske, 31 Ill. App. 3d 182, 334 N.E.2d 79 (1975) 7, 21

Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991) 16

Page

Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) 16

Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) . . . . . *passim*

Hughes v. General Motors Corp., 18 Fed. R. Serv. 2d (Callaghan) 1249 (S.D.N.Y. 1974) 6

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 25

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) (en banc) 16, 20

Johnson v. Owens-Corning Fiberglas Corp., 233 Ill. App. 3d 425, 599 N.E.2d 129, 174 Ill. Dec. 583, *rev. denied*, 147 Ill. 2d 627, 606 N.E.2d 1227, 180 Ill. Dec. 150 (1992), *cert. denied*, 113 S. Ct. 2335 (1993) 27

Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989) 16

Kearney v. Brakegate, Ltd., 263 Ill. App. 3d 355, 636 N.E.2d 117 (1994) 27

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) 25, 26

Page

Kochan v. Owens-Corning Fiberglas Corp., 242 Ill. App. 3d 781, 610 N.E.2d 683 (5th Dist.), *rev. denied*, 152 Ill. 2d 561, 622 N.E.2d 1208 (1993), *cert. denied*, 114 S. Ct. 1219 (1994) 18

Lebron v. National Railroad Passenger Corp., 63 U.S.L.W. 4109 (U.S. Feb. 21, 1995) 25

Liberty Mutual Insurance Co. v. Superior Court (Frysinger), 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363 (1st Dist. 1992) 6

Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 16, 20

Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985) 6

Mirkin v. Wasserman, 5 Cal. 4th 1082, 858 P.2d 568, 23 Cal. Rptr. 2d 101 (1993) 14

Owens-Corning Fiberglas Corp. v. Adams, 113 S. Ct. 3035 (1993) 18

Owens-Corning Fiberglas Corp. v. Barnes, 113 S. Ct. 3035 (1993) 18

Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630 (Va. 1992) 18

Page

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) . . . . . *passim*

Peterson v. City of Greenville, 373 U.S. 244 (1963) 24

Pickering v. Owens-Corning Fiberglas Corp., 265 Ill. App. 3d 806, 638 N.E.2d 1127, 203 Ill. Dec. 1 (1994), *rev. denied*, 158 Ill. 2d 583 (1994) . . . . . *passim*

Robertson v. Railroad Labor Board, 268 U.S. 619 (1925) 25

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) 15

Salter v. Upjohn Co., 593 F.2d 649 (5th Cir. 1979) 6

In re Sealed Case, 832 F.2d 1268 (D.C. Cir. 1987) 25

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994) 18

TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 10, 15

Truax v. Raich, 239 U.S. 33 (1915) 24, 26

Page

Statutes and Rules:

28 U.S.C. § 1257(a) 2

28 U.S.C. § 2403(b) 3

Illinois Supreme Court Rule 237(b) . . . . . *passim*

N.H. Rev. Stat. Ann. §§ 516:9-10 28

Washington Court Rule 43(f)(1) 28

Miscellaneous:

Restatement (Second) of Torts § 908,
comment e (1965) 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994
No. 94-___

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

Respondents.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Owens-Corning Fiberglas Corporation ("Owens-Corning") respectfully prays that this Court grant a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fifth District, entered in this case on May 3, 1994 and, after rehearing, on August 26, 1994.

OPINION BELOW

The Appellate Court's opinion is reported at 265 Ill. App. 3d 806, 638 N.E.2d 1127, 203 Ill. Dec. 1 (1994), and is reprinted in the Appendix at 1a-30a. The order of the Illinois Supreme Court denying leave to appeal is noted at 153 Ill. 2d 583 (1994) and is reprinted at 69a. The relevant orders and judgments of the trial court, the Circuit Court for the Third Judicial Circuit, Illinois, have not been reported but are reprinted at 35a-60a and 65a-68a.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on May 3, 1994 [1a-30a], and its order after rehearing was entered on August 26, 1994 [33a-34a]. On December 6, 1994, the Supreme Court of Illinois denied Owens-Corning's timely request for leave to appeal. [69a.] This petition has been filed within 90 days of that ruling. This Court has jurisdiction to review the Appellate Court's judgment under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Illinois Supreme Court Rule 237(b) provides, in part, that "[t]he appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear."

This petition questions the constitutionality of Rule 237(b) as applied in this case. Because neither the State of Illinois nor any agency, officer or employee of that State is a party, Owens-Corning notes that 28 U.S.C. § 2403(b) might be applicable.

STATEMENT OF THE CASE

In 1953, Owens-Corning began to distribute Kaylo, an insulation product containing approximately 15% asbestos. Owens-Corning began manufacturing Kaylo in 1958, when it purchased the Kaylo division from Owens-Illinois, Inc. Owens-Corning stopped making and selling asbestos-containing Kaylo by early 1973. [3/31/92 Tr. 60-61.] By now, more than 20 years later, Owens-Corning has received hundreds of thousands of claims from persons alleging injury from exposure to Kaylo.

The four consolidated cases that are the subject of this petition were filed in the Circuit Court for the Third Judicial Circuit of Illinois by respondents Charles Anderson, Carl Osterman and Donald Dossett and by respondent M. Oveta Pickering, on behalf of her deceased husband (collectively, "plaintiffs"). Plaintiffs claimed that they (and Mr. Pickering) had contracted asbestos-related conditions from their exposure to asbestos-containing products — allegedly including Kaylo — while working at an Illinois oil refinery at various times between the early 1940s and mid-1980s. Plaintiffs sought compensatory as well as punitive damages based on Owens-Corning's alleged misconduct in making and selling Kaylo without issuing warnings about the product's purported hazards. (Punitive damages were unavailable in the *Pickering* action, however, because Illinois law bars recovery of such damages in wrongful-death suits.)

A. Preservation of Constitutional Issues

This petition presents two federal questions: (*i*) whether the $7.5 million punitive damages awards are unconstitutionally excessive and (*ii*) whether Illinois Supreme Court Rule 237(b) was unconstitutionally applied to coerce the appearance at trial of four specified Owens-Corning employees over whom the trial court could not exercise personal jurisdiction.

In the trial court, Owens-Corning challenged the constitutionality of the punitive damages awards in its post-trial motion [61a-64a; *see also* R. C4905-5038], which the trial court denied [65a-68a]. Owens-Corning challenged the constitutionality of Illinois Rule 237(b), as applied in this case, both in a motion to quash the notices served under that rule [*e.g.*, 35a-36a; *see also* R. C3517-58, C3447-89; 3/3/92 Tr. 45-63] and in its post-trial motion [61a-62a; *see also* R. C4905-5038]. The trial court denied both motions. [35a-38a, 65a-68a; *see also* 3/5/92 Tr. 3-16.] On appeal to the Appellate Court of Illinois, Fifth District, Owens-Corning again raised its constitutional challenges to the punitive awards and Rule 237(b), but the court rejected Owens-Corning's arguments. [23a-26a, 15a-16a.]

B. Sanctions Under Illinois Supreme Court Rule 237(b)

On January 21, 1992, plaintiffs served on Owens-Corning a notice under Illinois Supreme Court Rule 237(b) demanding that the company's Chief Financial Officer ("CFO"), Paul V. Daverio, appear at trial and bring with him a vast array of corporate financial records from 1987 through 1992. [R. C2000-01.] *See infra* note 2. On February 25, plaintiffs served a second Rule 237(b) notice [R. C2733] for Glen H. Hiner, Owens-Corning's new Chairman and Chief Executive Officer ("CEO"), who had been with the

company for only one month [R. C3468]. Plaintiffs purportedly needed Messrs. Hiner and Daverio to testify about the company's financial condition as part of their punitive damages case (which, under Illinois law, was not even at issue in *Pickering*). [R. C4104-05; 3/5/92 Tr. 3-16.] The February 25 notice also demanded the appearance of two in-house Owens-Corning attorneys who had been involved in the company's asbestos personal injury defense but whose work on these matters had not begun until long after Owens-Corning had stopped making or selling asbestos-containing Kaylo. [R. C4371, C3474.] The two attorneys purportedly were needed because they had signed interrogatory responses in the asbestos litigation. [R. C4104-05; 3/5/92 Tr. 3-16.]

None of these four persons lived or worked in Illinois. Each had his office and principal place of business in Ohio, and all resided there except Mr. Hiner (who had not yet moved *to* Ohio).

On February 28, 1992, Owens-Corning moved to quash the Rule 237(b) notices because plaintiffs had not shown good cause, as required by Illinois law, to compel the four individuals to appear. Owens-Corning was concerned that its top officials would be subjected to harassment and effectively prevented from carrying out their corporate duties if each (or even a small percentage) of the thousands of asbestos claimants seeking punitive damages in Illinois (not to mention plaintiffs in other states) could compel the company's CEO and CFO to travel from Ohio and appear at trial as adverse witnesses.[1] In addition, both Owens-Corning and the

---

1. Courts throughout the country have recognized that attempts to require testimony from top corporate officials can lead to abuse and harassment and therefore have directed discovering parties to try first to obtain testimony from lower-level corporate witnesses or (continued...)

four individuals (who appeared specially through separate counsel) argued that the court lacked personal jurisdiction over the employees and thus could not constitutionally compel their appearance.

The Circuit Court denied the motion on March 5, 1992 and directed the company to produce the four employees. [35a-38a.] After the Illinois Supreme Court denied Owens-Corning's petition for leave to seek a writ of mandamus [39a], Owens-Corning informed the Circuit Court that it would not compel the employees to appear at trial [3/6/92 Tr. 20-21; 3/11/92 Tr. 70-74; 3/16/92 Tr. 15]. The court then entered a March 17 order sanctioning Owens-Corning, striking its pleadings, precluding it from cross-examining plaintiffs' witnesses or presenting evidence on *any* liability issue, and barring it from calling *any* current or former officer, director or employee as a witness. [40a-42a; *see also* 3/16/92 Tr. 4-23; 3/17/92 Tr. 3-36, 43.] Plaintiffs presented their case in chief, and the court entered a default judgment against Owens-Corning on March 31, 1992 "on the issue of liability" for both compensatory and punitive damages. [43a-48a.] The jury awarded compensatory damages of $2,791,971.45 in the *Pickering*

1.(...continued)

through means less intrusive than live testimony. *E.g.*, *Baine v. General Motors Corp.*, 141 F.R.D. 332, 335-36 (M.D. Ala. 1991) (barring deposition of General Motors' vice president where information was available from lower-level employees); *Liberty Mut. Ins. Co. v. Superior Court (Frysinger)*, 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363, 366 (1st Dist. 1992) ("'apex'" discovery "raise[s] a tremendous potential for discovery abuse and harassment. Vast numbers of personal injury claims could result in the deposition of the president of a national or international company whose product was somehow involved."); *accord Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Hughes v. General Motors Corp.*, 18 Fed. R. Serv. 2d (Callaghan) 1249, 1249-50 (S.D.N.Y. 1974).

action [53a-54a], while trial continued in the three personal injury cases, where punitive damages were available under Illinois law.

C. Sanctions Relating to Owens-Corning's Net Worth

Under Illinois law, evidence of a defendant's "net worth" — defined "very simply" as the "remainder after deduction of liabilities from assets" — is admissible solely "to give the jury a true idea of defendant's ability to pay a punitive judgment." *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 200, 334 N.E.2d 79, 94 (1975) (quotations omitted). Using this doctrine as an excuse for harassing and burdensome discovery, plaintiffs served 34 interrogatories demanding vast amounts of financial data going far beyond net-worth information. [R. C2002-14.][2] Because Owens-Corning is a public company, it has publicly available, audited financial statements, which it produced to plaintiffs. These statements showed that the company's net worth was a *negative* $1.076 billion. [Court Ex. 36E at 22-23.] Owens-Corning also provided information about its securities, executive compensation and benefits, financial statements, revenues, expenses, assets and liabilities. [R. C5245, C4302-25.] Owens-Corning objected, however, to producing highly confidential (and plainly inadmissible) information about *future* business plans or financial projections. Owens-Corning also

---

2. For example, plaintiffs demanded production of "[a]ll financial statements or other documents" for the years 1987 through 1992 reflecting gross income and expenses, total sales, total net income, gross advertising receipts, officers' and directors' salaries, capital contributions, taxes paid, amounts paid for fringe benefits and stock options for officers and directors, a statement of sources and use of funds, non-expense disbursements, projections, business plans, sales or acquisitions of capital assets, fair market value of corporate assets, intangible or other assets owned but not reflected on financial statements, and life insurance policies on stockholders, officers and directors. [R. C2000-01.]

objected to having to perform a special appraisal of its worldwide assets, but it did produce an extant appraisal of the insured replacement value of its buildings, machinery and equipment in the United States [4/1/92 Tr. 5; R. C5260] as well as the values of identifiable assets both inside and outside the United States [Court Ex. 36E at 38-39].

The court ordered production of still more information [R. C4531-32] and held an evidentiary hearing at which an Owens-Corning Vice President testified [4/2/92 Tr. 2-71]. Plaintiffs moved for sanctions, and the court granted the motion on April 3, 1992, prohibiting Owens-Corning from contesting the issue of net worth in the punitive damages cases. [49a-50a; *see also* 4/2/92 Tr. 91.] In instructing the jury on considerations relevant to determining the amount of punitive damages to be awarded, the court later directed the jurors to "accept as a fact, that the net worth of [Owens-Corning] is $1.5 billion" [51a] — an instruction that *overstated* the company's net worth by *$2.576 billion*.[3]

D. Punitive Damages Jury Charge and Awards

Plaintiffs tendered to the trial court two proposed instructions on punitive damages, one of which mentioned the punishment and deterrence purposes of punitive damages, and the other of which told the jury it could consider Owens-Corning's purported

---

3. The $1.5 billion figure represented plaintiffs' multiplication of Owens-Corning's outstanding shares by their then-current market price. [4/6/92 Tr. 110-18.] This market value figure, however, has nothing to do with "net worth" as defined under Illinois law and financial conventions; nor is it probative of a company's ability to pay a punitive damages award.

$1.5 billion "net worth."[4] Owens-Corning objected to the proposed instructions on constitutional grounds (among others), because they did not guide the jury or confine its discretion in deciding whether, and in what amount, to award punitive damages. [4/7/92 Tr. 20-28, 93-94; 4/8/92 Tr. 18; R. C4706-11.] The court overruled the objections. [4/7/92 Tr. 21, 23, 26-27, 94.]

Having defaulted Owens-Corning on liability for punitive damages, the court then issued plaintiffs' tendered instructions, which it supplemented by extemporaneously telling the jurors they could award "any amount [of punitive damages] you feel is appropriate." When Owens-Corning objected, the court overruled the objection. [51a-52a.]

The jury awarded $7.5 million in punitive damages — $2.5 million for each plaintiff — as well as compensatory damages of $102,500, $138,000 and $255,000 for plaintiffs Anderson, Dossett and Osterman, respectively. [55a-60a.] Owens-Corning filed a timely post-trial motion challenging the constitutionality of the punitive damages, the jury instructions and the extraterritorial

---

4. The two written instructions read in full:

> "[I]f you believe that justice and public good require it, you may, in addition to any damages to which you find such Plaintiff or Plaintiffs entitled, award an amount which will serve to punish [Owens-Corning] and to deter others from the commission of like offenses." [51a.]

> "If you decide that the interests of justice and public good warrant the assessment of punitive damages against [Owens-Corning], you may consider the net worth of [Owens-Corning] in determining what, if any, amount of punitive damages would be sufficient to punish [Owens-Corning] and to deter others from like offenses. The Court has found, and you shall accept as a fact, that the net worth of [Owens-Corning] is $1.5 billion." [51a.]

application of Rule 237(b). [61a-64a.] The trial court summarily denied the motion. [65a-68a.]

Owens-Corning appealed to the Appellate Court of Illinois, Fifth District, preserving its arguments that the punitive damages awards and the application of Rule 237(b) violated the Due Process Clause. [3/31/93 Brief.] The Appellate Court affirmed. [1a-30a.] The court later granted Owens-Corning's petition for rehearing and allowed the trial transcript to be added to the record [31a-32a], but ultimately ruled that its original decision would stand as filed [33a-34a]. The Illinois Supreme Court denied Owens-Corning's request for leave to appeal [69a] as well as its requests for reconsideration [72a-73a] and for a stay of mandate [70a-71a]. Justice John Paul Stevens denied Owens-Corning's emergency application for a stay pending the filing and disposition of this petition. [74a-76a.]

REASONS FOR GRANTING THE WRIT

Just last Term, this Court reiterated in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335, 2341 (1994), that the Fourteenth Amendment's Due Process Clause "imposes a *substantive* limit on the size of punitive damage awards" and requires judicial review of their size (emphasis added). The Court previously had ruled in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21 (1991), that a punitive damages award would not be constitutional unless the damages were "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." And in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993), a plurality of the Court opined that "grossly excessive" punitive awards breach substantive due process limitations and that this "grossly excessive" standard incorporates "a general concern of reasonableness" (quotations and brackets omitted).

The Court has not yet elaborated on either "the character of the standard that will identify unconstitutionally excessive awards" or "what standard of review is constitutionally required." *Honda Motor Co.*, 114 S. Ct. at 2335, 2341 n.10. However, the Court recently granted certiorari in *BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995), in which BMW has asked the Court to adopt various "objective" factors that courts should consider in evaluating excessiveness. Those factors apply as well to the present case and demonstrate that the $7.5 million punitive judgment against Owens-Corning is unconstitutionally excessive.

The Court therefore should either grant Owens-Corning's petition for certiorari at this time, or hold the petition until *BMW* has been decided and then grant the petition and vacate and remand for reconsideration in light of *BMW*. As the Court is aware, BMW is not alone in facing multiple punitive damages actions in multiple jurisdictions for the same course of conduct. Whether those claims number 1,000 (as potentially could be the case for BMW) or 200,000 (as have been filed against Owens-Corning), courts and litigants need meaningful guidance on how to treat punitive damages claims, especially in mass-tort litigation. At a minimum, the Illinois Appellate Court should be given an opportunity to reconsider its rulings in this matter in light of the Court's forthcoming decision in *BMW*.

The Court also should grant certiorari to consider the Illinois courts' application of Illinois Supreme Court Rule 237(b), through which Illinois courts frequently circumvent Fourteenth Amendment limitations on their jurisdiction by conscripting employers to coerce the appearance of named individuals over whom the State itself could not constitutionally exercise personal jurisdiction. This erroneous and dangerous doctrine subverts constitutional restrictions on States' authority, in conflict with

numerous decisions of this Court. It also presents an important question of federal law that this Court should settle promptly, to prevent other parties from using Rule 237(b) and similar rules in other States to harass Owens-Corning — which has thousands of asbestos claims pending in Illinois — and other corporate litigants by threatening to turn their directors, officers and employees into full-time trial witnesses for adverse parties.

I.

THE $7.5 MILLION PUNITIVE DAMAGES JUDGMENT IS GROSSLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE AND THE FACTORS PRESENTED IN THE *BMW* CASE.

As this Court recognized in *Honda Motor Co.*, "[p]unitive damages pose an acute danger of arbitrary deprivation of property" and often allow juries to "use their verdicts to express biases against big businesses, particularly those without strong local presences." 114 S. Ct. at 2340-41. The Court therefore held that "the Constitution imposes a substantive limit on the size of punitive damage awards" and that the Due Process Clause also requires "judicial review of the size of punitive damage awards." *Id.* at 2335, 2341.

The certiorari petition recently granted in the *BMW* case poses the question of when a punitive damages award is unconstitutionally excessive. To answer this question, BMW has proposed a number of "objective" factors (based on this Court's prior statements) to assist a reviewing court in determining whether a punitive award is unconstitutionally excessive. Those factors include (*i*) the relationship between the punitive damages and the actual or potential harm, (*ii*) the existence of other punitive awards for the same alleged misconduct and (*iii*) a comparison of the punitive

award at issue with other awards for the same or similar conduct. These same factors should play a role in any evaluation of the excessiveness of the awards here, and the Court therefore should grant certiorari so the Illinois courts can review the judgment with the benefit of the Court's *BMW* decision.

In fact, Owens-Corning's petition presents an even more compelling need for review than does *BMW*. The three punitive awards here — $2.5 million each, totalling $7.5 million — are more excessive than the single $2 million award in *BMW*. In addition, Owens-Corning's situation is more serious than BMW's because Owens-Corning — like numerous other defendants faced with multiple product liability or other tort claims — is subject to an even larger number of claims arising from a single course of conduct and seeking punitive damages. The existence of and potential for multiple and unlimited awards of punitive damages for the same conduct exacerbates the excessiveness of the $7.5 million awarded here to just three of some 100,000 pending claimants. Moreover, the procedures through which the $7.5 million awards were imposed and affirmed were far less protective of Owens-Corning's due process rights than were the Alabama procedures approved in *Haslip*. These procedural problems render the excessive punitive awards even more suspect than they otherwise might be — and cast further doubt on their ability to withstand substantive due process scrutiny.

A. Relationship Between Punitive and Compensatory Damages

Citing *Haslip*, BMW asks the Court to consider the excessiveness of the punitive award in light of its relationship to the actual or potential harm. This Court in *Haslip* reviewed a punitive damages award that was "more than 4 times the amount of com-

pensatory damages." Although the Court ultimately upheld the award, it warned that "the monetary comparisons are wide and, indeed, may be close to the line . . . of constitutional impropriety." 499 U.S. at 23-24.

Like the punitive award in *BMW*, the $2.5 million in punitive damages awarded to each of the three plaintiffs here crossed that constitutional line. The ratios ranged from almost 10 times compensatory damages for Mr. Osterman and more than 18 times for Mr. Dossett to more than 24 times for Mr. Anderson [55a-60a] — well above the proportion that raised constitutional concerns in *Haslip*. In fact, the Appellate Court ruled that, under Illinois law, "the amount of punitive damages does *not* have to be proportional to the amount of compensatory damages awarded." [25a (emphasis added).] The court thus disavowed the existence of *any* proportionality requirement.

As in *BMW*, the excessiveness of these ratios is far more of a problem here than in *Haslip*, which involved only isolated conduct. BMW allegedly repainted some 1,000 cars sold in the United States and thus could be sued and subjected to punitive damages up to 1,000 times. Owens-Corning's position is even worse: the company already has received over 200,000 asbestos-related claims. Almost 100,000 claims were pending (and another 74,000 had been resolved) when the judgments here were entered [Court Ex. 36E at 26], and even more claims are pending today. In this context, even a one-to-one ratio between punitive and compensatory damages is excessive: where compensatory damages amount to millions or billions of dollars, and where hundreds of thousands of claims have been filed, the relationship between exemplary and actual damages should be measured in fractions, not multiples — if punitive damages are to be awarded at all. *See, e.g., Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1106, 858 P.2d 568, 583, 23 Cal.

Rptr. 2d 101, 116 (1993) ("the additional deterrent value of punitive damages does not appear to be needed [where] actual damages, alone, represent a potentially crushing liability"); *see also Dunn v. HOVIC*, 1 F.3d 1371, 1405 (3d Cir.) (Weis, J., dissenting) ("The amounts awarded [against Owens-Corning] in prior litigation have been more than adequate to meet the needs of punishment and deterrence."), *cert. denied*, 114 S. Ct. 650 (1993). Thus, punitive awards ranging from almost 10 to more than 24 times compensatory damages clearly are out of line — especially where the compensatory damages themselves are as substantial as they were here.[5]

B. Existence of Other Punitive Awards for the Same Course of Conduct

BMW also asks the Court to consider the existence or possibility of multiple awards of punitive damages in evaluating excessiveness — as did the punitive damages scheme upheld in

---

5. Although *TXO* upheld a punitive award that was 526 times larger than the compensatory award, the plurality based its decision on the relationship between the $10 million punitive award and the *potential* harm that could have resulted, which apparently ranged from $1 million to $8.3 million. 113 S. Ct. at 2722. Moreover, the actual harm caused in *TXO* was relatively small (only $19,000), so a higher punitive ratio might have been justifiable to accomplish the goals of punishment and deterrence. *TXO* posed the classic case for punitive damages, which originally were designed for situations where actual damages were either unavailable or too insignificant to demonstrate society's disapproval of the alleged misconduct. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967). But where each plaintiff has been awarded substantial actual damages ranging from $102,500 to $255,000, and where 100,000 other plaintiffs also are currently seeking compensatory and punitive damages for the same conduct, ratios even as high as those the Court previously has approved cannot be justified.

Haslip.[6] Like *BMW*, this case also presents the question whether, and to what extent, the existence of and potential for other punitive awards for the same conduct should be a factor in determining the excessiveness of the punitive damages at issue.

Indeed, the argument for requiring consideration of this factor is particularly strong here. By the time plaintiffs' cases went to trial in early 1992, almost 20 years after the conduct at issue had ended, about 160,000 asbestos personal injury claims had been filed against Owens-Corning, and approximately 85,400 were then pending. [Court Ex. 36E at 26.] (The numbers have increased substantially since then.) The record shows that, as of December 1990, 11 previous juries already had awarded $40,718,000 in punitive damages against Owens-Corning. [12/19/90 Affidavit of Robert A. McOmber ("McOmber Aff.") ¶¶ 8, 17.] (These num-

---

6. *See Haslip*, 499 U.S. at 22 (reviewing court considers "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation"); *see also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (en banc) (*Haslip* requires "double recovery analysis [of] other civil or criminal penalties levied on the defendant"); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991) ("Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including . . . any other punitive damages award arising out of the same conduct."); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991); *see also* Restatement (Second) of Torts § 908, comment e (1965).

In fact, the very existence of multiple, unlimited awards of punitive damages for a single course of conduct constitutes the type of unconstrained and excessive punishment that the Due Process Clause prohibits. *E.g., Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064, *vacated on other grounds*, 718 F. Supp. 1233, 1234 (D.N.J. 1989).

bers also have increased very substantially.) At the same time, Owens-Corning also was paying enormous amounts of money to compensate plaintiffs and resolve claims. During 1990, for example, the company resolved about 12,200 asbestos claims at a cost of $117 million (excluding defense costs); during 1991, it resolved another 15,500 claims at an additional cost of $145 million. [Court Ex. 36E at 26.] By the end of 1991, Owens-Corning also had charged a total of $950 million against its earnings to cover the *uninsured* future costs of resolving then-pending asbestos claims and additional claims to be received through 1999. [*Id.* at 23.]

In this context, punitive awards of $2.5 million per person cannot stand. If even 10% of the 85,400 then-pending claimants were to obtain similar judgments, Owens-Corning's additional punitive liability would amount to *$21.35 billion* — not including any amounts to be paid for compensatory damages and settlements. Not only is any such liability unconstitutionally excessive; it also would preclude Owens-Corning from compensating other claimants who have not yet recovered for their own alleged injuries.

C. Relationship to Other Punitive Awards for the Same Course of Conduct

BMW asks the Court to consider the relationship of the punitive damages to other awards for the same type of conduct, and it notes that another jury in the same jurisdiction declined to award punitive damages on similar facts. This Court's *Haslip* opinion sanctioned a "comparative analysis" — in which the award at issue is compared with other punitive awards for similar conduct — as "an additional check on the jury's or trial court's discretion." 499 U.S. at 20-21. Once again, this case presents the same issue as in *BMW*, and a comparative analysis of the punitive damages here would show their unconstitutional excessiveness.

The $7.5 million award — $2.5 million to each of three plaintiffs — is both the largest total and the largest per capita judgment ever upheld against Owens-Corning after appeal in an asbestos case. In fact, to counsel's knowledge, it is one of the largest awards, if not the largest award — either total or per capita — ever sustained on appeal against *any* asbestos defendant. No other total award sustained on appeal against Owens-Corning has ever exceeded $5 million (in a case involving five plaintiffs); no other per-plaintiff award has ever exceeded $1.5 million after appeal; and some unappealed awards have been substantially less.[7] And, as in *BMW*, a significant number of juries have not awarded punitive damages at all. *See Dunn v. HOVIC*, 1 F.3d at 1388.

The in banc Court of Appeals for the Third Circuit recently held that a district court had given "insufficient consideration to the effect of successive punitive awards in asbestos litigation" in remitting a $25 million award against Owens-Corning to $2 million. The Third Circuit further reduced the award to $1 million because

---

7. *See Owens-Corning Fiberglas Corp. v. Adams*, 113 S. Ct. 3035 (1993) (certiorari denied where $30,000 was awarded to each of 21 plaintiffs, for total of $630,000); *Owens-Corning Fiberglas Corp. v. Barnes*, 113 S. Ct. 3035 (1993) (certiorari denied where $250,000 was awarded to each of 15 plaintiffs, for total of $3,750,000); *Dunn v. HOVIC*, 1 F.3d at 1391 ($1 million for one plaintiff, after remittiturs); *Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683 (5th Dist.) ($1 million to each of five plaintiffs; total of $5 million), *rev. denied*, 152 Ill. 2d 561, 622 N.E.2d 1208 (1993), *cert. denied*, 114 S. Ct. 1219 (1994); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994) ($1.5 million to one plaintiff); *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630 (Va. 1992) ($100,000 to one plaintiff); *see also* McOmber Aff. ¶¶ 8, 17 (citing judgments of $280,000, $25,000 and $8,000). Other punitive damages judgments still are subject to appeal or post-trial motions; the remainder were settled after entry of judgment.

"[o]ur review of the list of jury verdicts submitted by OCF to the district court indicates to us that even the $2 million dollar figure greatly exceeds the level of punitive damages awarded in other similar asbestos cases." *Dunn*, 1 F.3d at 1391. The court concluded that $1 million was "the *maximum* amount of punitive damages that could reasonably have been awarded in this case." *Id.* (emphasis added). Five members of the in banc court dissented, however, because they believed the Due Process Clause bars *any* further awards of punitive damages against Owens-Corning. *Id.* at 1400-05 (Weis, J., dissenting); *id.* at 1405 (Becker, J., dissenting). The total and per capita awards here far exceed the amounts that so concerned the *Dunn* court. The comparative approach thus demonstrates the judgment's unconstitutional excessiveness.

D. Additional Considerations Indicating Excessiveness

In *Haslip* and *Honda*, the Court noted the relationship between the procedural and substantive due process analyses of a punitive damages award: compliance with procedural due process provides some comfort (although not total assurance) that a punitive award will not be substantively excessive. *See Haslip*, 499 U.S. at 21 (upholding award because jury instructions and post-trial review helped ensure that damages were substantively "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"); *see also Honda Motor Co.*, 114 S. Ct. at 2341 ("proper jury instruction . . . is a well-established and, of course, important check against excessive awards," but judicial review for substantive excessiveness still is required because jury might not follow instructions).

In the present case, however, neither the trial court's nor the Appellate Court's procedures conformed to *Haslip*'s and *Honda*'s standards. These procedural deficiencies — unlimited jury

discretion guided only by greatly exaggerated corporate wealth evidence, and lack of meaningful appellate review — undermine whatever presumptive validity the jury's verdicts otherwise might have had and reinforce the need for a substantive excessiveness review based on the factors presented in *BMW*.

Inadequate Jury Instructions. This Court held in *Haslip* that "unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 499 U.S. at 18. Because of the sanctions entered against Owens-Corning, the jury was allowed to determine only the amount of — not liability for — punitive damages, and the jury charge gave the jurors essentially unlimited discretion in fixing that amount. In addition to the written instructions previously discussed with the parties, the court extemporaneously told the jury they could award "any amount [of punitive damages] you feel is appropriate." [51a-52a.] This instruction, which effectively authorized the jury to exercise unbounded discretion in selecting the punitive award, was constitutionally insufficient under *Haslip*. *See, e.g., Johnson v. Hugo's Skateway*, 974 F.2d at 1414–15 ("'standardless'" instructions allowing jury to award such punitive damages "'as you shall unanimously agree to be proper'" were unconstitutional because they failed to provide "guidance about what to consider in fixing the 'proper' amount"); *Mattison v. Dallas Carrier Corp.*, 947 F.2d at 100-01, 105 (instruction that "'[t]he amount of punitive damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and deter it and others from like conduct'" violated due process because jury was "left to its own devices to take property or mete out punishment to whatever extent

it feels is best in the course of the process, . . . without any meaningful standard or limitation").[8]

Focus on Wealth Evidence. In addition, the instructions improperly (and inaccurately) focused the jury's attention on the corporate defendant's alleged wealth — an issue about which this Court previously has expressed its concern. *See Honda Motor Co.*, 114 S. Ct. at 2340-41 ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses"); *Haslip*, 499 U.S. at 22 ("the factfinder must be guided by more than the defendant's net worth"); *see also id.* at 19 (noting that jury was *not* allowed to hear wealth evidence). The *only* specific factor the trial court told the jury to consider was Owens-Corning's alleged $1.5 billion "net worth." [51a.] And this instruction itself was incorrect (and certainly incomplete) because it used Owens-Corning's stock market value, not its "net worth," which is defined as assets minus liabilities, *Fopay*, 31 Ill. App. 3d at 200, 334 N.E.2d at 94. Owens-Corning's "net worth" actually was a *negative* $1.076 billion, not a positive $1.5 billion. [Court Ex. 36E at 22-23.] The court thus *overstated* Owens-Corning's net worth by *$2.576 billion*.

Inadequate Appellate Review. This Court held in *Haslip* that due process requires meaningful and adequate appellate review

---

8. The Appellate Court dismissed Owens-Corning's attack on the trial court's spontaneous addition to the written jury instructions because the appellate record did not contain "a report of proceedings" showing what the judge had added. [24a.] The court granted rehearing so Owens-Corning could file this report of proceedings [31a-32a] — but then declined to change its original opinion even though the record now contained the missing information [33a-34a]. Thus, the Appellate Court apparently rejected Owens-Corning's argument on the merits.

as "an additional check on the jury's or trial court's discretion." 499 U.S. at 20-21; *see also Honda Motor Co.*, 114 S. Ct. at 2335 ("Due Process Clause requires judicial review of the amount of punitive damage awards"). The Appellate Court, however, did not make any reasoned, independent evaluation of the excessiveness of the punitive awards. It merely declined to assume that the *trial court's* review was "cursory, standardless or meaningless," and it summarily concluded that the awards "do not violate defendant's right to substantive due process." [25a.] For example, the Appellate Court did not independently assess the implications of other past and potential awards of punitive damages against Owens-Corning; it stated only that "there is nothing in the record in the case at bar to lead us to believe that the *trial court* did not consider this factor." [26a (emphasis added).] Nor did the court acknowledge the obvious error in the jury instruction on Owens-Corning's "net worth" and review the judgment based on the audited financial information in the record [Court Ex. 36E at 22-23].

These various procedural problems were exacerbated by the sanctions imposed on Owens-Corning, which precluded the company from mounting any defense to plaintiffs' punitive damages case. Even the scant record that does exist provides ample basis to conclude that the $7.5 million punitive awards are unconstitutionally excessive under the factors at issue in *BMW*. But the Draconian defaults also interfered with the Appellate Court's ability to perform the excessiveness review required by *Honda*, because Owens-Corning had been barred from making a full record in the trial court. Even if the Due Process Clause allows a court to sanction a litigant by precluding critical information that a jury needs to make a reasoned decision on punitive damages, an appellate court cannot use a state procedural rule to blind itself to constitutional limits on the size of punitive damages awards.

* * * *

As BMW argued in its petition, the lower courts charged with the task of reviewing the size of punitive damages awards under the Due Process Clause need guidance from this Court. The Court's *BMW* decision may well provide that guidance. Because the same factors raised in *BMW* should inform any evaluation of the excessiveness of the punitive awards at issue here, the Court should either grant the petition at this time, or hold the petition pending disposition of *BMW* and then grant certiorari to allow the Illinois courts to fulfill their constitutional responsibilities in accordance with this Court's teachings in *BMW*.

II.
THE ILLINOIS COURTS' APPLICATION OF RULE 237(b) VIOLATES THE DUE PROCESS CLAUSE.

The above discussion shows why the punitive damages judgments here must be reviewed for excessiveness in light of the impending *BMW* decision. But there is yet another reason to grant Owens-Corning's certiorari petition: the judgments in the four actions were based on drastic defaults entered through an unconstitutional application of Illinois Supreme Court Rule 237(b). The trial court sanctioned Owens-Corning for not producing at trial — essentially to testify on plaintiffs' behalf — four specified out-of-state employees whose attendance the Illinois court itself could not constitutionally compel. Those orders — even though ostensibly directed at Owens-Corning rather than the named employees — amounted to unconstitutional state action in violation of the Due Process Clause.

Despite the trial court's lack of authority to compel the employees' appearance, the Appellate Court saw no due process

problem in sanctioning Owens-Corning for failing to force the four individuals to appear because "it is only the corporate defendant . . . which the court is attempting to compel." [16a.] The Appellate Court thus concluded that Owens-Corning, rather than the trial court, would be forcing the employees to submit to Illinois' jurisdiction. This reasoning, however, ignores the principle that the State may not do through a private person what the Fourteenth Amendment prohibits it from doing directly.

A. A State Court May Not Coerce a Private Party to Do What the Court Itself Cannot Do.

This Court's precedents establish that a State may not avoid constitutional limitations on its own powers simply by having a private party act on its behalf or in its stead. If the Fourteenth Amendment precludes the State itself from doing something, the State "may not [so act] by direct action or through the medium of others who are under State compulsion to do so." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (emphasis and quotations omitted); *see, e.g., Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (State cannot discriminate and therefore cannot coerce private parties to honor racially restrictive covenants by awarding damages for breach, even though private parties could make and adhere to such covenants); *Truax v. Raich*, 239 U.S. 33, 38-39, 41 (1915) (State cannot deny employment to noncitizens and therefore cannot do so indirectly by setting limit on number of noncitizen employees whom private employers may hire, even though private employers could fire or refuse to hire employees at will).[9]

---

9. *See also Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (Fourteenth Amendment violated where blacks were denied service and arrested in private restaurant because of ordinance requiring (continued...)

It is undisputed here that the trial court itself lacked jurisdiction to order the four out-of-state employees to travel from Ohio to testify at trial. [16a, 35a-36a.][10] Accordingly, the court could not accomplish this result indirectly by forcing Owens-Corning to compel the employees' appearance.

It is no answer to say that Owens-Corning could have ordered its employees or directors to travel to Illinois to testify, or that Owens-Corning "chose" to suffer a default rather than to command the named individuals to appear. Where the State subjects Owens-Corning to default judgments of almost $11 million for failing to make a "choice" that plaintiffs and the trial court wanted it to make (but could not have compelled through subpoena power), that "choice" is just as coerced and illusory as was the private

---

9.(...continued)

racial separation; even though "manager would have acted as he did independently of the existence of the ordinance," convictions "had the effect . . . of enforcing the ordinance"); *cf. Lebron v. National R.R. Passenger Corp.*, 63 U.S.L.W. 4109, 4116 (U.S. Feb. 21, 1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.").

10. A court cannot require individuals to give evidence unless it can exercise personal jurisdiction over them. *E.g., Robertson v. Railroad Labor Board*, 268 U.S. 619, 622-27 (1925); *In re Sealed Case*, 832 F.2d 1268, 1272-73 (D.C. Cir. 1987). The Due Process Clause itself precludes a sovereign from exercising personal jurisdiction over a person or entity who does not have at least "minimum contacts" with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). It is immaterial that the Illinois court had personal jurisdiction over Owens-Corning. Employees' contacts with the forum "are *not* to be judged according to their employer's activities there." *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added); *accord Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984).

employer's "choice" in *Truax* or the private covenantor's "choice" in *Barrows*. The decision "becomes not [Owens-Corning's] voluntary choice but the State's choice" that Owens-Corning compel the individuals' attendance "or suffer damages." *Barrows*, 346 U.S. at 254. State action therefore is present, and the Fourteenth Amendment constrains the court's conduct.

B. This Court's Review Is Necessary to Resolve this Important Constitutional Issue and to Prevent Rampant Litigation Abuse Threatening Recurrent Deprivations of Constitutional Rights.

The Illinois Appellate Court's constitutionally infirm ruling that an employer's judicially mandated coercion of its employees is not state action for due process purposes has potentially far-reaching implications. For example, the same reasoning would permit a State to sanction a private employer for refusing to require specified out-of-state employees, under threat of termination, to submit to state-court jurisdiction not only as witnesses but also as defendants — thereby circumventing the Fourteenth Amendment's prohibition against state-court exercise of jurisdiction over individual employees who themselves lack minimum contacts with the State, *see Calder*, 465 U.S. at 790; *Keeton*, 465 U.S. at 781 n.13. A State also could coerce an employer to order individual employees (in their personal capacity) to waive their Fifth Amendment rights against self-incrimination, or to do any number of other things the State itself could not require.

The constitutionality of state court rules requiring employers to produce their employees as witnesses is an important ques-

tion that recurs at the trial court level.[11] A state provision like Rule 237(b) can be a powerful weapon of harassment against corporate litigants such as Owens-Corning, which at the time of trial was a defendant in thousands of cases in Illinois alone — and nearly 100,000 asbestos personal injury cases nationwide. If any and every plaintiff, simply by filing a notice under a state rule, could require a corporate party anywhere in the world to drag its top officers, directors and employees into any state court in the nation, no company would be able to function. Its officers, directors and employees virtually would become full-time witnesses, spending their time in airplanes, lawyers' offices and courtrooms, rather than at their jobs.

In addition to encouraging recurrent harassment, the unconstitutional application of state rules such as Rule 237(b) creates a situation where a corporation's litigation adversaries (rather than the corporation itself) can determine which specific corporate employees must appear at trial to testify about matters known to the corporation. Such a regime is both grossly unfair and directly contrary to the ordinary rules of civil litigation, which grant adverse parties broad discovery of corporate employees through depositions at locations convenient to the employees — but which allow the corporation itself to choose its own corporate representatives for trial, at least where (as here) the individual witnesses lie outside the trial court's subpoena power.

---

11. *See, e.g., Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill. App. 3d 425, 599 N.E.2d 129, 174 Ill. Dec. 583, *rev. denied*, 147 Ill. 2d 627, 606 N.E.2d 1227, 180 Ill. Dec. 150 (1992), *cert. denied*, 113 S. Ct. 2335 (1993); *see also Kearney v. Brakegate, Ltd.*, 263 Ill. App. 3d 355, 636 N.E.2d 117 (1994); *Adcock v. Brakegate, Ltd.*, 247 Ill. App. 3d 824, 617 N.E.2d 885 (1993), *aff'd on other grounds*, No. 76053, 1994 Ill. Lexis 156 (Ill. Nov. 23, 1994).

Owens-Corning believes that the issues posed by state provisions like Rule 237(b) regularly arise in actions against corporate defendants in Illinois and other states with similar rules, *see, e.g.*, Wash. Court Rule 43(f)(1); N.H. Rev. Stat. Ann. §§ 516:9-10, but tend to evade review. Both the magnitude of the possible sanctions for refusing to compel out-of-state employees to appear and the unavailability of an appeal as of right until after entry of final judgment can strongly discourage a party defending a single action from taking the position that Owens-Corning took below. *See Bluestein v. Upjohn Co.*, 102 Ill. App. 3d 672, 678-79, 430 N.E.2d 580, 585 (1981) (after Illinois Supreme Court denied mandamus petition, defendant produced witness). A "repeat" litigant such as Owens-Corning, however, which has been sued in hundreds of thousands of cases, cannot afford to acquiesce every time a plaintiff demands that it bring specified officers, employees or directors to a foreign State. This Court therefore should review the judgment below to provide guidance to litigants and trial courts about the constitutional validity of Rule 237(b) and similar provisions in other States.

CONCLUSION

The Court therefore should grant Owens-Corning's petition for a writ of certiorari.

Respectfully submitted,

LARRY L. SIMMS
THOMAS G. HUNGAR
Gibson, Dunn & Crutcher
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

ANNE E. COHEN
(*Counsel of Record*)
JONATHAN E. RICHMAN
ROBERT D. GOODMAN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

KAREN I. WARD
Owens-Corning Fiberglas Corporation
Building 53
2790 Columbus Road, Route 16
Granville, Ohio 43023-1200
(614) 321-5814

Counsel for Petitioner

March 6, 1995

APPENDIX
TABLE OF CONTENTS

Page

Opinion of the Appellate Court of Illinois, Fifth District, May 3, 1994 . . . . . 1a

Order of the Appellate Court, Fifth District, granting petition for rehearing, June 15, 1994 . . . . . 31a

Order of the Appellate Court, Fifth District, on rehearing, August 26, 1994 . . . . . 33a

Transcript of oral ruling of Circuit Court of Illinois denying motion to quash Rule 327(b) notices, March 3, 1992 . . . . . 35a

Order of the Circuit Court of Illinois denying motion to quash Rule 237(b) notices, March 5, 1992 . . . . . 37a

Order of the Supreme Court of Illinois denying leave to file mandamus petition relating to Rule 237(b) issue, March 12, 1992 . . . . . 39a

Order of the Circuit Court of Illinois imposing sanctions on Owens-Corning for not producing witnesses under Rule 237(b), March 17, 1992 . . . . . 40a

Order of the Circuit Court of Illinois entering default judgment against Owens-Corning, March 31, 1992 . . . . . 43a

Page

Order of the Circuit Court of Illinois entering sanctions as to Owens-Corning's net worth, April 3, 1992 . . . . . 49a

Jury instructions on punitive damages, including transcript relating to Circuit Court's extemporaneous addition to instructions 51a

Judgment of the Circuit Court of Illinois in the *Pickering* action, April 13, 1992 . . . . . 53a

Judgment of the Circuit Court of Illinois in the *Anderson* action, April 13, 1992 . . . . . 55a

Judgment of the Circuit Court of Illinois in the *Osterman* action, April 13, 1992 . . . . . 57a

Judgment of the Circuit Court of Illinois in the *Dossett* action, April 13, 1992 . . . . . 59a

Excerpt from Owens-Corning's post-trial motion, July 9, 1992 . . . . . 61a

Order of the Circuit Court denying Owens-Corning's post-trial motion, September 15, 1992 . . . . . 65a

Order of the Supreme Court of Illinois denying leave to appeal, December 6, 1994 . . . . . 69a

Order of the Supreme Court of Illinois denying stay of mandate, January 11, 1995 . . . . . 70a

Order of the Supreme Court of Illinois denying Owens-Corning's motion for reconsideration, January 23, 1995 . . . . . 72a

Page

Letter from United States Supreme Court noting denial of Owens-Corning's emergency application for a stay, January 27, 1995 . . . . . 74a

NO. 5-92-0691

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	)	Appeal from the Circuit Court of Madison County. No. 90-L-1546
CHARLES ANDERSON, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	)	No. 91-L-621
CARL OSTERMAN, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	)	No. 91-L-622
DONALD DOSSETT, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	)	No. 91-L-623
	)	Honorable George J. Moran, Judge Presiding

JUSTICE WELCH delivered the opinion of the court:

These four consolidated actions, one for wrongful death and survivorship brought by M. Oveta Pickering, as special administrator of the estate of Arvel Pickering, deceased, and three for personal injuries brought by Charles Anderson, Carl Osterman, and Donald Dossett, were brought to recover damages arising from injuries sustained by decedent and plaintiffs through employment-related exposure to asbestos-containing insulation products manufactured or distributed by defendant, Owens-Corning Fiberglas Corporation. The case was tried to a jury in the circuit court of Madison County, and the jury returned verdicts in favor of plaintiffs and against defendant, assessing both compensatory and punitive damages. Final judgment was entered April 13, 1992. Defendant's posttrial motion was denied September 15, 1992, and defendant's notice of appeal was filed October 14, 1992.

Defendant raises several issues on appeal. We will present only those facts necessary for our disposition of those issues. The first issue relates to the consolidation of the four cases in the trial court. The cases were consolidated for trial over defendant's objection by order dated October 7, 1991, the court pointing out that all of the plaintiffs were allegedly exposed to asbestos while employed at the Clark Oil Refinery in Roxana, Illinois. Defendant moved to sever the wrongful death action from the personal injury actions, arguing that presentation of evidence and argument relating to punitive damages in the personal injury actions would be prejudicial to defendant in the wrongful death action, in which punitive damages are not allowed. (*See Mattyasovszky v. West Towns Bus Co.* (1974), 21 Ill. App. 3d 46, 52-53, 313 N.E.2d 496, 500-501, *aff'd.* (1975), 61 Ill.2d 31, 330 N.E.2d 509.) In response, plaintiffs proposed that any prejudice could be averted by allowing the jury to reach a verdict in the wrongful death action before presenting any evidence regarding defendant's net worth or argument concerning punitive damages.

By order entered March 6, 1992, the trial court denied defendant's motion to sever and adopted plaintiffs' proposed procedure. Specifically, the procedure was as follows: plaintiffs would not be allowed to mention punitive damages in opening statement; both parties would present all their evidence except that relating to defendant's net worth, which is relevant only to the issue of punitive damages; the parties would argue the wrongful death action, the jury would be instructed on that action, and that action would be submitted for verdict; and following a verdict in the wrongful death action, the parties would present evidence on defendant's net worth, and the personal injury cases would be argued and submitted to the jury.

On April 1, 1992, defendant filed an objection to the court's order of March 6, 1992, adopting this procedure. Defendant argued that the order violates Illinois's proscription against bifurcated trials (*see Mason v. Dunn* (1972), 6 Ill. App. 3d 448, 451, 285 N.E.2d 191, 193) and would be prejudicial to defendant. In this objection, defendant argued that the procedure would be prejudicial to defendant not only in the wrongful death action but also in the personal injury actions, as the jury would hear evidence of decedent Pickering's death by asbestosis, which evidence would not be admissible in the personal injury actions, and that the jury's deliberations in the wrongful death action would, in some inarticulated [*sic*] way, affect its deliberations in the personal injury actions to the prejudice of defendant.

On appeal, defendant abandons its argument that the trial procedure violates Illinois's proscription against bifurcated trials and argues only that the trial court abused its discretion in denying defendant's motion for severance because the consolidation prejudiced defendant.

The Illinois Code of Civil Procedure provides that an action may be severed, and actions may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right. (735 ILCS 5/2-1006 (West 1992).) A motion to

sever is addressed to the sound discretion of the trial judge, to be exercised in each case by an appraisal of administrative convenience and the possibility of prejudice to substantial rights of the litigants in the light of the particular problems which will arise in the course of the trial. (*Mount v. Dusing* (1953), 414 Ill. 361, 367, 111 N.E.2d 502, 505.) Inherent in the power to consolidate is the authority to integrate evidence at a joint trial in the interest of convenience and economy. *Augenstein v. Pulley* (1989), 191 Ill. App. 3d 664, 683, 547 N.E.2d 1345, 1357.

Defendant argues that it was prejudiced by the consolidation in two ways: (1) the jury in the personal injury cases heard about Pickering's death from asbestosis even though the three living plaintiffs suffered only from mild to moderate asbestosis, and the jury based the personal injury plaintiffs' damages on those awarded in the wrongful death case; and (2) the jury in the wrongful death action heard argument and evidence related to punitive damages and defendant's wilful misconduct even though punitive damages were not recoverable in the wrongful death action.

Defendant argues that evidence of Pickering's death, introduced in the personal injury cases, "undoubtedly inflamed the jury and increased the compensatory damages awarded to the personal-injury plaintiffs." Defendant argues that plaintiffs' counsel continually attempted to link the living plaintiffs with decedent in his argument and comments to the jury and asked the jury to consider the damages it had already awarded in the Pickering case as a framework for damages in the personal injury actions. Defendant concludes that "[i]t is inconceivable that this barrage of argument and testimony about Mr. Pickering's suffering, death and damages did *not* influence the jury's decisions about his three colleagues, who allegedly suffered only mild or moderate impairments". (Emphasis in original.)

While defendant insists that some prejudice must have resulted from the consolidation of the wrongful death and personal injury actions, it points to no objective indication of such prejudice.

We note that it is particularly difficult for us to evaluate any possible prejudice as defendant/appellant has elected not to provide us with a report of proceedings, and we will not presume prejudice where there is no objective indication of it. (See *O'Brien v. Walker* (1977), 49 Ill. App. 3d 940, 947-48, 364 N.E.2d 533, 538 (the party asserting error must demonstrate prejudice and it will not be assumed by a court of review).) As this court pointed out in *Schwartz v. Swan* (1965), 63 Ill. App. 2d 148, 159, 211 N.E.2d 122, 127:

> Juries try and determine fact issues in extremely complicated cases involving third party complaints, cross claims [*sic*], counterclaims, [and] multiple plaintiffs and defendants, with a high degree of perception. One of hundreds of examples is the case of *Nelson v. Union Wire Rope Corporation* [citation], in which the jury assessed damages in 18 separate verdicts, some involving injuries and some wrongful deaths, and distinguished between the defendants in a complicated case to the extent that one was exonerated. Properly instructed, there is no reason to anticipate confusion of the jury, or prejudice to the rights of any of the parties.

In the instant case, the jury was instructed in all four of the consolidated cases that the rights of each plaintiff were separate and distinct, that each plaintiff was entitled to a fair consideration of his own case, that each case was to be decided as if it were a separate lawsuit, and that each case must be governed by the instructions applicable to that case. The jury in the instant case awarded different amounts of compensatory damages to each of the plaintiffs, demonstrating that it had carefully and rationally considered the actual damages suffered by each. We see no indication of any prejudice to defendant as a result of the consolidation of the wrongful death action with the three actions for personal injuries.

Defendant argues that it was prejudiced in the wrongful death action because the jury was allowed to hear argument and evidence relating to punitive damages and defendant's wilful misconduct even though punitive damages are not recoverable in a wrongful death action. Defendant argues that this evidence "probably inflated" the compensatory damages award in the wrongful death action.

Initially, we find no error in the jury hearing evidence of defendant's wilful and wanton misconduct in the wrongful death action as the complaint in that cause includes a count alleging such wilful and wanton misconduct. Defendant does not argue that this count was improperly submitted to the jury, and in any event, it has been held that wilful and wanton misconduct is a ground for seeking recovery of pecuniary damages in a wrongful death action. *Mattyasovszky v. West Towns Bus Co.* (1974), 21 Ill. App. 3d 46, 55, 313 N.E.2d 496, 503.

Other than evidence of defendant's wilful and wanton misconduct, defendant fails to specify any argument or evidence relating to punitive damages which the jury heard in the wrongful death action. Under the procedure adopted by the trial court, evidence and argument regarding defendant's net worth, which pertains only to punitive damages, was not presented until after verdict in the wrongful death action. We find no prejudice to defendant in the wrongful death action as a result of the consolidation of that action with the three personal injury actions.

The record in the instant case demonstrates that the trial court carefully considered the propriety of consolidation of these four cases and that each party was given ample opportunity to present their respective positions on the issue. The consolidation resulted in no prejudice to any substantial right of defendant. The trial court did not abuse its discretion in denying defendant's motion to sever the trial of the wrongful death action from that of the personal injury actions.

Defendant's next claims of error relate to its failure to comply with notices to appear directed to officers and employees of defendant and the resulting sanctions imposed by the trial court, all pursuant to Supreme Court Rule 237(b) (134 Ill. 2d R. 237(b)), and sanctions imposed pursuant to Supreme Court Rule 219(c) (134 Ill. 2d R. 219(c)) for defendant's failure to comply with certain discovery requests and orders.

On January 21, 1992, pursuant to Supreme Court Rule 237(b) (134 Ill. 2d R. 237(b)), plaintiffs served on defendant a notice to appear directed to Paul V. Daverio, defendant's chief financial officer. On February 25, 1992, plaintiffs served on defendant a notice to appear directed to Glen H. Hiner, defendant's chairman and chief executive officer, C. Duane Callender, senior in-house counsel for defendant, and Robert A. McOmber, an in-house counsel for defendant.

On February 28, 1992, Daverio, Hiner, Callender, and McOmber filed a special and limited appearance and a motion for a protective order. This motion alleged that the Illinois court had no personal jurisdiction over these individuals and could not compel them to appear at trial.

On that same date, defendant filed a motion to quash the notices to appear. The motion to quash alleged facts to demonstrate that the Illinois courts had no personal jurisdiction over any of the individuals. The motion alleged that the court could not compel their appearances at trial and that any attempt to compel their appearances would violate their constitutional rights. The motion alleged alternatively that plaintiffs had failed to show good cause for requiring the appearance at trial of these individuals and that compelling their appearances would subject defendant to undue harassment, prejudice, and hardship.

On March 5, 1992, the trial court entered an order denying defendant's motion to quash the Rule 237(b) notices to appear. The court ordered defendant to produce Hiner and Daverio for

purposes of determining defendant's net worth, financial status, and other issues relating to punitive damages and McOmber and Callender, who had previously answered interrogatories on behalf of defendant on substantive issues. The order recites as follows:

> Defendant * * * has lead [*sic*] the Court to believe that none of the four individuals will appear before this Court. The Court orders that [defendant] provide the Court with a definitive answer at 12:00 noon on March 6, 1992, whether or not [defendant] will produce these gentlemen for trial purposes.
>
> If [defendant] refuses to produce these individuals, the Court is placing [defendant] on notice that it may impose sanctions on [defendant] for its wilful and deliberate noncompliance with Supreme Court Rule 237.

In their memorandum in opposition to defendant's motion to quash the notices to appear, filed March 10, 1992, plaintiffs asserted that the need to secure evidence in support of plaintiffs' punitive damages claims constituted good cause to produce these individuals. The memorandum asserted that Daverio and Hiner were needed to testify as to facts going to defendant's net worth. Plaintiffs alleged that Callender and McOmber were needed to testify because they signed defendant's interrogatory answers and plaintiffs were entitled to examine them as to the accuracy and veracity of their answers. The memorandum asserted that there was reason to suspect that some of the interrogatories may have been answered untruthfully and fraudulently.

Plaintiffs eventually filed a motion for sanctions against defendant for its failure to comply with the notices to appear based on defendant's representation that the four individuals would not appear at trial. On March 17, 1992, the trial court entered an order granting plaintiffs' motion for sanctions. That order recites:

> that [defendant], in open Court, has stated that it will not comply with this Court's Order of March 5, 1992, directing [defendant] to produce certain of its officers to testify at trial in this matter;
>
> that [defendant's] refusal to comply with said Order of March 5, 1992, is wilful and in complete disregard of the Court's authority;
>
> that [defendant] has been advised of the consequences of refusing to comply and given every opportunity to comply[.]

The court imposed the following sanctions: defendant's pleadings were stricken, and all the allegations of plaintiffs' complaints were deemed admitted; plaintiffs would be required to present a *prima facie* case on all liability issues, and the court reserved ruling on whether to enter a default judgment against defendant on all liability issues pending presentation of such *prima facie* case; plaintiffs would be required to present a case on all damages issues, but defendant would not be allowed to cross-examine plaintiffs' witnesses or to present evidence on any liability issue; defendant would be allowed to cross-examine plaintiffs' witnesses and present evidence on all damages issues; defendant would not be allowed to present any witnesses who were current or former officers, directors, or employees of defendant; plaintiff would be allowed to present expert testimony to establish defendant's net worth and defendant would not be allowed to present any evidence on the issue of net worth; and defendant was ordered to pay plaintiffs' costs and attorney fees incurred in connection with defendant's motion to quash the notices to appear and plaintiffs' motion for sanctions.

On March 31, 1992, the court entered an order finding that plaintiffs had presented sufficient evidence at trial to establish a *prima facie* case of liability against defendant on both the negli-

gence and wilful and wanton misconduct theories. Accordingly, pursuant to its order of March 17, 1992, the court entered a judgment by default against defendant on the issue of liability as to all counts of plaintiffs' complaints, in both negligence and wilful and wanton misconduct. The court further ordered that the issue of compensatory damages would be submitted to the jury and defendant would be allowed to present evidence on the issue of punitive damages in the personal injury cases. The order recites:

> [I]f [defendant] relents in its refusal to produce [Hiner and Daverio] to testify concerning its net worth, this Court may reconsider and modify its sanction Order,[ ]and permit [defendant] to present evidence of its net worth.

The order further recites:

> The Court has, throughout the presentation of Plaintiffs' evidence, advised [defendant] that the Court would entertain a motion to modify its Order imposing sanctions, if [defendant] relented in its refusal to comply with this Court's Order pursuant to Rule 237(b). [Defendant] has not done so.

On April 2, 1992, yet another sanction was entered against defendant, this time for its failure to comply with certain discovery requests and orders. On January 21, 1992, plaintiffs served on defendant interrogatories seeking financial information relating to defendant's net worth. On February 18, 1992, defendant filed its objections and initial responses to the interrogatories, and on March 10, 1992, pursuant to court order, defendant filed a supplemental response repeating and reasserting its objections to the interrogatories but providing some information. On March 31, 1992, defendant was ordered to determine what additional financial information might be available for discovery, to produce certain information for an *in camera* inspection, and to produce other information for plaintiffs. On April 1, 1992, an order was entered

granting defendant additional time to comply with the order of March 31. Defendant was advised that failure to comply might result in sanctions. On April 2, 1992, the court entered an order finding that defendant had failed to comply with the order of April 1 and imposing the following sanctions: plaintiffs would be allowed to amend their complaints to allege defendant's net worth was $1.5 billion, this allegation would be deemed admitted by defendant, plaintiffs would be allowed to present a *prima facie* case as to this net worth, and defendant would be prohibited from contesting it.

On appeal, defendant argues first that the trial court erred in denying its motion to quash the Rule 237(b) notices to appear because: (1) plaintiffs failed to show good cause for requiring the four named individuals to appear at trial in Illinois; and (2) use of Rule 237(b) to compel the individuals' appearances in Illinois violates both the United States and Illinois Constitutions.

Supreme Court Rule 237(b) provides that the appearance at trial of a person, who at the time of trial is an officer, director, or employee of a party, may be required by serving the party with a notice designating the person who is required to appear. (134 Ill. 2d. R. 237(b).) Compelling the appearance of a party at trial is a matter for the sound discretion of the trial court, and the court's power to order a party to appear should only be exercised for a good cause and in such a manner that a party may not be subject to harassment, oppression, or hardship. *Pacemaker Food Stores, Inc. v. Seventh Mont Corp.* (1983), 117 Ill. App. 3d 636, 648, 453 N.E.2d 806, 815.

In *Oakview New Lenox School District No. 122 v. Ford Motor Co.* (1978), 61 Ill. App. 3d 194, 378 N.E.2d 544, plaintiff served notice on defendant pursuant to Supreme Court Rule 237(b) that the presence of D.R. Jollife would be required at trial. Jollife was an assistant secretary of defendant, was a resident of Michigan, and had signed answers to interrogatories on behalf of defendant. Jollife's affidavit attached to the interrogatories

indicated that the matters stated in the answers were not within his personal knowledge but had been assembled by authorized employees and counsel of defendant. Defendant filed a motion to quash the notice to appear, which was denied. At the beginning of trial defendant indicated that Jollife would not appear because he knew nothing about the case, and defendant asked leave to file Jollife's affidavit and deposition, both of which asserted his lack of knowledge of any of the matters involved in the case. The court refused to allow the documents to be filed and indicated that Jollife was required to appear. When Jollife did not appear at trial when called, the court imposed sanctions upon defendant pursuant to Supreme Court Rule 237.

On appeal, this court held that defendant had submitted to the personal jurisdiction of the court by filing a general appearance in the case, and that this jurisdiction included the power to order a corporate party to produce its officers and directors at trial. (*Oakview New Lenox*, 61 Ill. App. 3d at 198, 378 N.E.2d at 547.) This court also recognized, however, that the power to order a party to appear should only be exercised for good cause and in such a manner that a party may not be subjected to harassment, oppression, or hardship. (*Oakview New Lenox*, 61 Ill. App. 3d at 198-99, 378 N.E.2d at 547.) The court found:

> [T]he record is utterly devoid of any relevant information which plaintiff expected to elicit from Jollife at trial, but does contain numerous sworn statements declaring that Jollife has no personal knowledge of the matters involved. In light of plaintiff's failure to assert any facts to the contrary, or to disclose what purpose would be served by requiring Jollife to appear, we are compelled to conclude that plaintiff failed to show good cause. (*Oakview New Lenox*, 61 Ill. App. 3d at 199, 378 N.E.2d at 547-48.)

The court held that the order requiring Jollife to be present at trial was erroneous, and that the sanctions imposed were also improper. *Oakview New Lenox*, 61 Ill. App. 3d at 199, 378 N.E.2d at 548.

In Soto v. E.W. Bliss Division of Gulf & Western Manufacturing Co. (1983), 116 Ill. App. 3d 880, 452 N.E.2d 572, sanctions were imposed on a defendant corporation for failure to produce an employee at trial pursuant to a Rule 237(b) notice to appear. The person noticed to appear was James Lewis, an engineer. Defendant argued that under *Oakview*, it was not required to produce Lewis because Lewis had no personal knowledge of relevant facts. The court found *Oakview* to be distinguishable, however, because, although defendant indicated that Lewis possessed no relevant information, unlike *Oakview*, no supporting documents were presented by defendant. Furthermore, the record contained numerous statements by plaintiff's counsel concerning the information expected to be elicited from Lewis, and this information was relevant and not cumulative. The court found that, under these circumstances, defendant was not justified in refusing to produce the witness Lewis, and the court affirmed the sanctions imposed.

We find the facts in the case at bar to be more like those in *Soto* than those in *Oakview*. The record in the instant case demonstrates the relevant information which plaintiffs hoped to elicit from the four named individuals. Hiner and Daverio were wanted to testify to the defendant's net worth, a fact which is relevant to plaintiffs' claims for punitive damages. It can hardly be argued that Hiner, defendant's chief executive officer, and Daverio, defendant's chief financial officer, would not be possessed of this relevant information. Both Callender and McOmber were corporate counsel for defendant involved in asbestos litigation. As such, their knowledge and information went beyond merely signing interrogatories on behalf of defendant, as had the noticed assistant corporate secretary in *Oakview*. They had answered, under oath, interrogatories on behalf of defendant and were needed to testify to the accuracy and veracity of those answers. The record as a whole demonstrates that plaintiffs believed that some of these interrogato-

ries were answered untruthfully and fraudulently with respect to defendant's notice or knowledge of other claims against it for causing asbestosis. The record as a whole further demonstrates that Callender and McOmber were possessed of relevant knowledge regarding prior claims against defendant. Furthermore, nowhere in the record is there any positive assertion by defendant that these individuals did not possess the relevant knowledge or information sought by plaintiffs. The record contains no sworn affidavits or testimony to that effect, but only the argument of counsel that the individuals had no "personal knowledge".

Defendant argues that Hiner had been defendant's chief executive officer for only one month prior to the notice to appear and therefore could not have had relevant information regarding defendant's net worth. We find this argument to be speculative, unsupported by any facts and unpersuasive. Indeed, we find it highly unlikely that Hiner would have even taken the position as defendant's chief executive officer without some knowledge of defendant's financial status and net worth.

Defendant also points out that plaintiffs never sought to depose Hiner or Daverio or otherwise discover their testimony prior to noticing them to appear. We are aware of no requirement that a plaintiff engage in such discovery prior to serving a notice to appear, and defendant cites to none.

Defendant also points out that plaintiffs did not seek to obtain the desired information from lower-level employees of defendant before noticing the top executives to appear. Again, we are aware of no requirement in Illinois that relevant information be sought from lower-level employees of a corporate defendant before the officers, directors, and top-level employees may be served with a notice to appear. Supreme Court Rule 237(b) explicitly authorizes a plaintiff to require a corporate defendant's top executives, that is, its officers and directors, to appear at trial. There is no requirement in Rule 237(b) that a plaintiff first seek relevant information from lower-level employees. While defendant correct-

ly asserts that attempts to require testimony from top corporate officials can lead to abuse and harassment, the requirement that a Rule 237(b) notice to appear be enforced only for good cause, and not for harassment, oppression, or hardship, protects the corporate defendant and its top executives from such abuse. As we have already stated, compelling the appearance of a party at trial under Rule 237(b) is a matter for the sound discretion of the trial court, rather than a mandatory requirement. (*Pacemaker Food Stores, Inc. v. Seventh Mont Corp.* (1983), 117 Ill. App. 3d 636, 648, 453 N.E.2d 806, 815.) That the Federal courts and some foreign jurisdictions may have imposed a requirement that information be sought first from lower-level employees does not compel such a requirement in Illinois. The Illinois Supreme Court, in promulgating its Rule 237(b), has declined to impose such a requirement, and we will not presume to question its wisdom.

Defendant argues that application of Rule 237(b) in this case to compel the appearance at trial of the four officers and employees of defendant violates the due process guarantees of both the United States and Illinois Constitutions. Defendant argues that the Illinois court had no personal jurisdiction over the four noticed individuals, a fact which the plaintiffs and the trial court concede, and that the court could not properly pressure their employer to coerce their appearance. Defendant argues that a private employer's actions become the State's actions for due process purposes when they are coerced or required by State authority. Defendant argues that the fourteenth amendment to the United States Constitution and the even more stringent due process principles of the Illinois Constitution prohibit the court from trying to force defendant to do what the court itself could not constitutionally accomplish. In sum, defendant argues that the circuit court cannot constitutionally attempt to compel, through sanctions imposed on defendant, the appearance at trial of witnesses over whom it has no personal jurisdiction.

Precisely the same argument was presented to this court in *Johnson v. Owens-Corning Fiberglas Corp.* (1992), 233 Ill. App.

3d 425, 433-34, 599 N.E.2d 129, 134, *appeal denied* (1992), 147 Ill. 2d 627, 606 N.E.2d 1227, *cert. denied* (1993) _____ U.S. _____, 124 L.Ed.2d 246, 113 S.Ct. 2335, and we rejected it there as we reject it here. We stated therein:

> As long as the order is directed at the corporate defendant rather than the individual employees and directors, principles of due process are not violated, and a court may sanction a corporate defendant for its failure to produce its employees. (*Johnson*, 233 Ill. App. 3d at 434, 599 N.E.2d at 135.)

We emphasize that the circuit court is not attempting to compel the noticed individuals to do anything and that no sanctions are imposed against those individuals. It is only the corporate defendant, who has already conceded the circuit court's personal jurisdiction over it, which the court is attempting to compel, and it is only against the corporate defendant that sanctions are imposed. The circuit court has no, and asserts no, personal jurisdiction over the noticed individuals, but the court asserts jurisdiction only over the corporate defendant. No principles of due process are violated in this context.

Defendant's next argument is that the sanctions imposed against it for its failure to comply with the Rule 237(b) notices exceed the scope of sanctions permitted by Supreme Court Rule 237. That rule provides that upon a failure to comply with the notice the court "may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate." (134 Ill. 2d Rules 237(b), 219(c).) Defendant argues that the sanction order entered was not "just" because the defaults imposed on defendant went far beyond any matters about which any of the four individuals competently could have testified, that is, the sanctions imposed were not reasonably related to the violations. Defendant argues that the scope of the sanctions exceed all reasonable bounds.

The particular sanction imposed for a failure to comply with a Rule 237(b) notice to appear rests largely within the trial court's discretion, the exercise of which will not be disturbed absent an abuse of discretion. (*Quarles v. Nationwide Insurance Co.* (1978), 66 Ill. App. 3d 455, 465, 383 N.E.2d 1234, 1241.) Among the sanctions specifically provided in Supreme Court Rule 219(c), and therefore proper for a violation of Rule 237(b), are the striking of pleadings and the entry of default judgment. (134 Ill. 2d R. 219(c).) While both Rule 237(b) and Rule 219(c) provide for the entry of any order which is just, it has been held that, at least under Rule 219(c), the sanction imposed must bear some reasonable relationship to the information withheld in defiance of the discovery request or order. (See *People ex rel. General Motors Corp. v. Bua* (1967), 37 Ill. 2d 180, 197, 226 N.E.2d 6, 16.) The sanctions which may be imposed under Rule 219(c) are:

> such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment. (*Bua*, 37 Ill. 2d at 196, 226 N.E.2d at 16.)

However, a court is not limited to only those sanctions enumerated in Rule 219(c) but may enter any order which is just, provided the purpose of a sanction for a discovery violation is to accomplish discovery rather than to inflict punishment. (*Dyduch v. Crystal Green Corp.* (1991), 221 Ill. App. 3d 474, 480, 582 N.E.2d 302, 307.) Furthermore, the striking of an answer, thereby causing a default, is the most severe sanction a court can impose on a recalcitrant defendant, and such sanction is proper only in those cases where the actions of a party show deliberate, contumacious, or unwarranted disregard of a court's authority. *Johnson v. Owens-Corning Fiberglas Corp.* (1992), 233 Ill. App. 3d 425, 435, 599 N.E.2d 129, 135.

Considering all of this, we are of the opinion that the trial court did not abuse its discretion in striking defendant's answer and entering a default judgment against it on all liability issues. There is no question that the actions of the defendant in refusing to comply with the Rule 237(b) notices to comply were deliberate, contumacious, and an unwarranted disregard of the court's authority. Defendant was warned prior to the imposition of any sanctions that its failure to comply with the notices might result in sanctions. The trial court repeatedly characterized defendant's refusal as wilful and deliberate and in complete disregard of the court's authority. Therefore, this most severe of sanctions was warranted by the defendant's actions.

Nor can there be any question that the purpose of the sanctions imposed was to compel the defendant to comply with the notices, and not to punish the defendant for its refusal. Defendant was threatened with sanctions before they were imposed. In its order of March 17, 1992, the trial court noted that defendant had been advised of the consequences of refusing to comply and had been given every opportunity to comply. In the court's order of March 31, 1992, the court expressly stated that, if defendant relented in its refusal, the court would consider modifying the sanction order. That same order states that the court had repeatedly advised defendant that it would entertain a motion to modify the sanctions should defendant decide to comply with the notices to appear. It is clear that the court did not wish to punish defendant but imposed sanctions only in an attempt to compel defendant to comply with the notices to appear.

There are numerous reported cases in which similar sanctions were imposed as a result of a defendant's wilful refusal to comply with a Rule 237(b) notice to appear. In *Johnson*, defendant refused to produce two corporate employees pursuant to Rule 237(b) notices. The court ordered defendant's pleadings stricken and entered default judgment against it on all liability issues. On the issue of damages, defendant was restricted in its proof. On appeal, this court found that the record revealed that defendant had

had ample opportunity to comply with the notices but had wilfully refused to do so. This court found sufficient evidence in the record to support a finding that the noticed witnesses would have had relevant information on the issues as to which sanctions were imposed. The trial court did not abuse its discretion in striking defendant's pleadings and entering default judgment against defendant. See also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Story* (1991), 218 Ill. App. 3d 829, 578 N.E.2d 1129; *People ex rel. Hartigan v. Organization Services Corp.* (1986), 147 Ill. App. 3d 826, 498 N.E.2d 597; *Quarles v. Nationwide Insurance Co.* (1978), 66 Ill. App. 3d 455, 383 N.E.2d 1234.

We do note in the instant case that plaintiffs were required to present a *prima facie* case, and that default judgment was not entered against defendant until the trial court was satisfied that plaintiffs had done so. See *Ryan v. Bening* (1978), 66 Ill. App. 3d 127, 383 N.E.2d 681.

Finally, we find that the sanctions imposed are reasonably related to the defendant's refusal to produce at trial Hiner, Daverio, Callender, and McOmber. The testimony of Hiner and Daverio was desired on the issue of defendant's net worth. The trial court's sanction of prohibiting defendant from presenting any evidence of its net worth was reasonably related to the testimony sought to be elicited from these two individuals. The testimony of Callender and McOmber was reasonably related to the issues of liability. Either or both of these individuals had knowledge relating to defendant's notice of prior asbestosis claims against it, which goes to both negligence and wilful and wanton misconduct. As defendant's counsel involved in asbestos litigation, both Callender and McOmber would be possessed of relevant knowledge on the issues of liability. While the knowledge of these two individuals with respect to causation is not crystal clear from the record, we again point out that appellant/defendant has declined to provide this court with a report of proceedings before the trial court. It is the appellant's burden to provide this court with a sufficiently complete record of the proceedings at trial to support a claim of error, and

any doubts which may arise from the incompleteness of the record will be resolved against the appellant. (*Foutch v. O'Bryant* (1984), 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959.) Furthermore, in the absence of a complete record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959.

Defendant proposes several other possible sanctions which it argues would have been more appropriate here. While there were certainly other sanctions available, it is not our function to substitute our judgment for that of the trial court where there is no abuse of the trial court's discretion. We find no such abuse here.

Defendant also challenges on appeal the trial court's imposition of sanctions pursuant to Supreme Court Rule 219(c) for defendant's failure to fully respond to plaintiffs' discovery requests for financial information in connection with their punitive damages claim. The trial court ordered that plaintiffs' amended allegations that defendant's net worth was $1.5 billion would be deemed admitted and that defendant would not be allowed to contest this value. Defendant argues that the sanction was improper for two reasons: (*1*) defendant had sufficiently responded to all "legitimate" discovery requests; and (*2*) the sanction was not reasonably related to the violation.

Defendant argues that the trial court erred in ordering defendant to produce certain financial information because it had already produced information sufficient to establish its net worth and financial discovery on punitive damages should be limited, production of the requested information would have been unduly burdensome, and disclosure of certain nonpublic materials could have provided valuable information to defendant's competitors and created securities laws problems for defendant.

Supreme Court Rule 201(b)(1) provides that the scope of discovery is limited to "any matter relevant to the subject matter

involved in the pending action." (134 Ill. 2d R. 201(b)(1).) The range of relevant and material information which is discoverable includes not only what is admissible at trial but also that which leads to what is admissible at trial. (*Willing v. St. Joseph Hospital* (1988), 176 Ill. App. 3d 737, 744, 531 N.E.2d 824, 829.) Considerable latitude is permitted during discovery, and the trial court has broad discretion in ruling on discovery matters. (*Willing*, 176 Ill. App. 3d at 744, 531 N.E.2d at 829.) Absent a manifest abuse of its discretion, affirmatively and clearly shown, the trial court's order concerning discovery shall not be disturbed on appeal. (*Willing*, 176 Ill. App. 3d at 744-45, 531 N.E.2d at 829.) Furthermore, the question of whether or not a party has properly answered interrogatories is within the discretion of the trial court, and that decision will not be disturbed unless that discretion is improperly exercised. (*Bradfield v. Illinois Central Gulf R.R. Co.* (1985), 137 Ill. App. 3d 19, 23-24, 484 N.E.2d 365, 368.) The burden is on the appellant to affirmatively show an abuse of discretion. *Bradfield*, 137 Ill. App. 3d at 24, 484 N.E.2d at 368.

It is well settled that evidence of a defendant's net worth and pecuniary position may be introduced in a case in which punitive damages is an issue. (*Topay v. Noveroske* (1975), 31 Ill. App. 3d 182, 200, 334 N.E.2d 79, 93.) The information which plaintiffs sought from defendant was aimed at discovering defendant's net worth or pecuniary position. While all of the information sought in discovery may not have been admissible at trial for purposes of proving defendant's net worth, if the information sought might have led to such admissible evidence, then it was within the proper scope of discovery. We are aware of no Illinois case which limits the scope of financial discovery relating to punitive damages. Despite defendant's arguments, it has failed to affirmatively show that the trial court abused its discretion in ordering defendant to comply with plaintiffs' discovery requests.

According to the trial court's order of March 31, 1992, the only financial information which defendant had provided to plaintiffs was published annual reports and proxy statements. Plaintiffs

had requested a detailed financial statement, similar to the one used by management and directors of defendant. The court's order directs defendant to produce for plaintiffs any "financial statements, audited or otherwise, [which] are provided to the management of the [defendant]". This order is hardly unreasonable or unduly burdensome to defendant, and production might lead plaintiffs to admissible evidence concerning defendant's true net worth, which may or may not be accurately reflected in its published annual reports and proxy statements. Furthermore, the court gave defendant the option of requesting a hearing for the purpose of showing why the request is burdensome to defendant and cannot be met.

The court's order also directs defendant to produce for *in camera* inspection "all business plans and financial projections related to future operations of" defendant and to produce a witness who will testify as to why the release of this information would place defendant at a competitive disadvantage. Obviously, the court took pains to protect defendant from having to reveal any information which might benefit its competitors. We find no abuse of discretion in this order.

Finally, the court ordered defendant to "produce all appraisals, estimates or other statements of the fair market value of the assets and liabilities of [defendant] along with the means or methodology of determining said market value and the purpose for which said fair market value was calculated." Again, we find nothing unduly burdensome in this order. The court did not, and could not, ask defendant to prepare such documents, but only to produce those that already existed. The defendant failed to comply with any terms of the order, despite having received a continuance in order to do so.

We simply do not agree with defendant that it sufficiently responded to all "legitimate" discovery requests. We find nothing unreasonable in the discovery order entered by the trial court. The information sought is relevant to the issue of punitive damages, the

discovery requests were not unduly burdensome, and the court took pains to protect defendant from having to reveal information which might hurt its competitive position. The trial court did not abuse its discretion in entering the discovery order and did not err in finding that defendant had failed to comply with it.

Defendant also argues that the sanction imposed was not reasonably related to the discovery violation or the withheld information. Defendant argues that a more appropriate sanction was available. It is not our function to substitute our judgment for that of the trial court. The trial court's order will not be disturbed absent an abuse of discretion. (*B & Y Heavy Movers, Inc. v. Fluor Constructors, Inc.* (1991), 211 Ill. App. 3d 975, 984, 570 N.E.2d 777, 783.) The sanction imposed was reasonably related to defendant's refusal to allow discovery of relevant financial information relating to its net worth. We find no abuse of discretion.

Defendant's next argument on appeal is that the punitive damages awards violate its right to due process because: (*1*) the court's instruction to the jury did not give the jury sufficient guidance in assessing punitive damages; (*2*) the court itself did not conduct a meaningful postverdict review of those awards; and (*3*) the awards are excessive. Defendant presented an identical argument to this court in *Kochan v. Owens-Corning Fiberglass Corp.* (1993), 242 Ill. App. 3d 781, 610 N.E.2d 683, where we rejected it, as we reject it here.

Defendant argues that the jury instructions on punitive damages (one of which, we note, is standard Illinois Pattern Jury Instructions number 35.01 (Illinois Pattern Jury Instructions, Civil, No. 35.01 (3d ed. 1989)) were unconstitutional in that they gave the jury essentially unlimited discretion in determining whether to award punitive damages and in what amount. We find, as we did in *Kochan*, 242 Ill. App. 3d at 800, 610 N.E.2d at 695), that defendant has waived any error in the jury instructions by failing to tender its own version of instructions. To preserve an objection to a jury instruction, a party must both specify the defect claimed and

tender a correct instruction. (*Deal v. Byford* (1989), 127 Ill. 2d 192, 202-03, 537 N.E.2d 267, 271.) It is the responsibility of the party challenging a jury instruction to submit an instruction to the trial judge that states the law for which he argues on appeal. *Deal*, 127 Ill. 2d at 203, 537 N.E.2d at 271.

In any event, we state again what we stated in *Kochan*: "[w]e do not believe these jury instructions gave the jury such 'unbridled discretion' that they were unconstitutional." (*Kochan*, 242 Ill. App. 3d at 800, 610 N.E.2d at 695.) The jury instruction given in the instant case is identical to that given in *Kochan*, and it does not violate defendant's due process rights. Defendant argues in this appeal that the instruction given in the instant case is worse than that given in *Kochan* because the trial court, on its own initiative and after the jury instruction conference, while reading the instructions to the jury, told the jury that it could award punitive damages in "any amount you feel is appropriate." However, because defendant has failed to provide us with a report of proceedings, this statement is not contained in the record on appeal. The written instructions contained in the record on appeal do not include this language. In the absence of a report of proceedings, we must assume that the jury was instructed in accordance with the written instructions contained in the record on appeal. *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959.

Defendant also argues that the trial court conducted a "standardless, unconstrained review" of the jury's punitive damages award, specifically referring to the trial court's lack of discussion of the issue and its brief ruling, which defendant refers to as an "unexplained assertion." The trial court held that the punitive damages award was "reasonable, supported by the evidence and not obviously the result of passion or prejudice." Defendant sets forth numerous factors which it believes the trial court should have considered in reviewing the jury's punitive damages award. Defendant argues that, because the trial court "applied no definable criteria whatsoever in denying [defendant's] post-trial motions," it failed to "conduct a constitutionally meaningful review of the jury's

verdict," and its review did not "constitute the type of post-trial scrutiny that due process requires."

As we stated in *Kochan*, "We do not agree that without a more thorough discussion there cannot be an effective appellate review." (*Kochan*, 242 Ill. App. 3d at 801, 610 N.E.2d at 696.) The fact that the trial court's ruling was stated briefly does not in any way imply that its review was cursory, standardless, or meaningless. We will not repeat what we have already held in *Kochan* on this issue. Defendant's due process rights were not violated by the trial court's postverdict review of the jury's punitive damages award.

Finally, defendant argues that the $2.5 million in punitive damages awarded to each of the three personal injury plaintiffs are so excessive as to violate defendant's right to substantive due process. Defendant argues that the punitive damages awarded are grossly out of proportion to the compensatory damages awarded ($255,000 to Osterman; $138,000 to Dossett; and $102,500 to Anderson), and that each plaintiff received the same punitive damages award despite differing compensatory damages awards. Defendant further argues that the total $7.5 million award is particularly excessive in light of the multitude of other asbestosis suits to which defendant is subject, with their actual and potential punitive damages awards.

We find that the punitive damages awarded here do not violate defendant's right to substantive due process. We do not find the amounts of the awards excessive in themselves. Nor are we aware of any requirement in Illinois that punitive damages bear some proportional relationship to the compensatory damages awarded. Defendant has directed us to no such case. Indeed, Illinois courts have held that the amount of punitive damages does not have to be proportional to the amount of compensatory damages awarded. (See *Hazelwood v. Illinois Central Gulf R.R.* (1983), 114 Ill. App. 3d 703, 711, 450 N.E.2d 1199, 1206.) The United States Supreme Court imposed no such requirement on the

States in *Pacific Mutual Life Insurance Co. v. Haslip* (1991), 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032, upon which defendant relies. *Haslip* merely approved of the procedure for reviewing punitive damages awards adopted by the courts in Alabama; it did not set forth any specific requirements that other States must follow.

With respect to defendant's argument that the punitive damages awards are excessive because they fail to take into account the punitive damages judgments that already have been awarded and might in the future be awarded against defendant, we note that in Illinois the potential liability of the defendant is a proper factor to consider in reviewing an award of punitive damages. (*Hazelwood*, 114 Ill. App. 3d at 713, 450 N.E.2d at 1207.) We stated there that it is appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future. (*Hazelwood*, 114 Ill. App. 3d at 713-14, 450 N.E.2d at 1207.) However, there is nothing in the record in the case at bar to lead us to believe that the trial court did not consider this factor in reviewing the jury's award of punitive damages. Our review of the punitive damages award does not lead us to conclude that the amount of the award was so excessive as to violate defendant's right to substantive due process.

We turn now to the final argument presented by defendant on appeal. Defendant argues that the trial court erred in ordering defendant to produce, pursuant to plaintiffs' discovery request, a certain in-house memorandum written by in-house counsel Callender, to his immediate supervisor, who was the attorney in charge of litigation for defendant. The memorandum was written October 14, 1980, and concerned defendant's discovery of certain asbestos-related workers' compensation claims that had been filed in the 1950's and 1960's and previously had not been known to exist in defendant's files. Defendant claims that the memorandum contains attorney analyses, legal opinions, and mental impressions about those workers' compensations claims and about defendant's asbestos litigation strategy.

Defendant voluntarily provided a redacted copy of the memorandum to plaintiffs' lawyer prior to trial. Plaintiffs moved for production of the unredacted memorandum, and on April 1, 1992, the trial court ordered defendant to produce for *in camera* inspection the unredacted memorandum to determine if the redacted portions were privileged. On that same date, the trial court ordered that the unredacted memorandum would be shown to plaintiffs' counsel for the sole purpose of allowing argument on whether the document was privileged.

On April 3, 1992, the trial court entered an order noting plaintiffs' claim that the memorandum demonstrates fraud and a coverup on the part of defendant such that any privilege may not apply to the memorandum and finding that plaintiffs had made a *prima facie* showing of such fraud in that it appeared that defendant had information pertinent to the case regarding asbestos-related workers' compensation claims which had not been disclosed to plaintiffs. Accordingly, the court ordered that defendant produce the complete document for *in camera* inspection.

On April 6, 1992, defendant filed its objections to production of the privileged document, which was supported by affidavits. On April 7, 1992, this court entered an order denying defendant's emergency motion for a stay of the proceedings pending consideration of its motion for leave to file a complaint for an order of *mandamus* or prohibition or supervisory order.

On April 8, 1992, the trial court entered an order in which it recites that it had shown the memorandum to plaintiffs' counsel for the purpose of receiving assistance in determining whether said memorandum was privileged, and that following argument, the court had determined that the memorandum was deprivileged under the "crime-fraud" exception to the attorney/client privilege. The trial court's order further recites that plaintiffs' counsel had indicated that he had disseminated the memorandum to various interested parties. The order recites that, on April 8, 1992, the trial court had received an order from the supreme court of Illinois

allowing defendant's motion for an emergency stay and directing the trial court to enter an order requiring that all copies of the memorandum be returned to the court and retained under seal and directing that plaintiffs take all available measures to prevent further disclosure of the memorandum or its contents. Accordingly, the trial court ordered that plaintiffs and their counsel return to the court all copies of the memorandum in their possession, that plaintiffs and their counsel file affidavits of compliance, and that plaintiffs and their counsel refrain from any further dissemination of the memorandum or its contents and take all available measures to prevent further disclosure of the memorandum and its contents pending further order of court. All copies of the memorandum were to be retained under seal in the court pending further court order.

On April 13, 1992, the court entered an order supplementing its order of April 8, 1992. The court ordered plaintiffs' counsel to return all copies of the memorandum *instanter* so that all copies could be retained under seal, to provide a list to the court and to defendant of all persons, law firms, or other entities to whom copies of said memorandum were provided and to whom the contents of said memorandum were disclosed, to send a copy of the supreme court's order of April 8 granting defendant's motion for emergency stay to all persons to whom copies of the memorandum had been provided or to whom its contents had been disclosed, to verify to the trial court and defendant the return of each copy of the memorandum and from whom it was received, and to take all available measures to prevent further disclosure of said memorandum or its contents. Apparently, the memorandum was never used by plaintiffs at trial and was never introduced into evidence or shown to the jury.

Defendant argues on appeal that the trial court erred in finding that the memorandum was not protected from discovery by the attorney/client privilege and the attorney work-product doctrine and that the court improperly ordered its production. We think this

issue is clearly moot at this stage of the proceedings, and we decline to address it.

An issue is considered moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief. (*Edwardsville School Service Personnel Association, IEA-NEA v. Illinois Educational Labor Relations Board* (1992), 235 Ill. App. 3d 954, 958, 600 N.E.2d 910, 914.) Courts of review will generally not consider issues where the results are not affected regardless of how the issues are decided. (*Edwardsville School Service Personnel Association*, 235 Ill. App. 3d at 958, 600 N.E.2d at 914.) When it becomes apparent that an opinion cannot affect the results as to the parties or the controversy before it, the court should not resolve the question merely for the sake of setting a precedent or to govern potential future cases. (*Edwardsville School Service Personnel Association*, 235 Ill. App. 3d at 958, 600 N.E.2d at 914.) Such is precisely the situation in the case at bar.

Defendant has already obtained the result it desired in the trial court when the court ordered all copies of the memorandum returned to the court and retained under seal. The memorandum was not used against defendant at the trial, so defendant was not prejudiced by the initial order compelling production of the memorandum. This issue presents no actual controversy between the parties, and it is impossible for us to grant any effective relief to defendant. Because the memorandum was not used at trial, the results of that trial will not be affected regardless of how the issue presented is decided by us. It is apparent to us that any opinion we state on this issue cannot affect the results as to the parties or the controversy between them, and we will not resolve the question merely for the sake of setting a precedent or to govern potential future cases. We note that, in our opinion, this issue does not fall within any of the recognized exceptions to the mootness doctrine. See *Edwardsville School Service Personnel Association*, 235 Ill. App. 3d at 959-61, 600 N.E.2d at 914-16.

For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed.

Affirmed.

LEWIS, P.J., and GOLDENHERSH, J., concur.

[Filed May 3, 1994]

NO. 5-92-0691
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, Plaintiff-Appellee,	Appeal from the Circuit Court of Madison County.
v.	
OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	No. 90-L-1546
CHARLES ANDERSON, Plaintiff-Appellee,	
v.	
OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	No. 91-L-621
CARL OSTERMAN, Plaintiff-Appellee,	
v.	
OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	No. 91-L-622
DONALD DOSSETT, Plaintiff-Appellee,	
v.	
OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	No. 91-L-623

ORDER

This cause has been considered on petition for rehearing of defendant-appellant; and on motion of defendant-appellant to sup-

plement the record with the report of proceedings in the trial court and objections thereto of plaintiffs-appellees; and the court being advised in the premises;

IT IS THEREFORE ORDERED that the motion to supplement the record on appeal shall be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the supplemental record consisting of the report of proceedings in the trial court shall be, and the same hereby is, FILED **instanter.**

IT IS FURTHER ORDERED that petition for rehearing shall be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the time for filing an answer to the petition shall extend to, and include, 21 days from the date of this order.

IT IS FURTHER ORDERED that the time for filing a reply to the answer shall extend to, and include, 14 days thereafter.

[Filed June 15, 1994]

NO. 5-92-0691
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	Appeal from the Circuit Court of Madison County. No. 90-L-1546
CHARLES ANDERSON, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	No. 91-L-621
CARL OSTERMAN, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	No. 91-L-622
DONALD DOSSETT, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLAS CORPORATION, Defendant-Appellant.	No. 91-L-623
	Honorable George J. Moran, Judge Presiding

ORDER

This cause has been considered on the grant of rehearing, and the court having reviewed the complete record on appeal as

supplemented with the report of proceedings and being advised in the premises;

IT IS THEREFORE ORDERED that this court's decision filed on May 3, 1994, shall stand as filed.

[Filed Aug. 26, 1994]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

ARVEL PICKERING,	)	90-L-1546
CHARLES ANDERSON,	)	91-L-621
CARL OSTERMAN,	)	91-L-622
DONALD DOSSETT,	)	91-L-623
Plaintiffs,	)	
	)	
v.	)	
	)	
OWENS-CORNING FIBERGLAS CORP., et al.,	)	
Defendants.	)	

REPORT OF PROCEEDINGS
MARCH 3, 1992
PRE-TRIAL MOTIONS

[Page 80]

THE COURT: Counsel, I have had this come up in other cases, and I am going to rule I guess in this case the same way that I have on those other cases, and I am going to deny the Motion to Quash the notices to appear. . . .

I absolutely agree that this Court has no power whatever over these individuals that are out of state, has no personal jurisdiction. They are not parties to the state, and this Court has no power to sanction them in any way, and that's very clear, and the other thing I think since this case is going up to the Supreme Court anyway we might as well have it all before the Supreme Court so they tell me differently.

[Page 84]

MR. SOLOTOROVSKY: Your Honor, it is my intention to seek an interlocutory appeal. What I am asking for is a ruling on my motion for protective order. I am seeking a ruling on my motion for protective order. I believe you have denied Mr. Fournie's Motion to Quash, and there is two motions that were actually brought. I brought a Motion for Protective Order on behalf of these individuals.

Mr. Fournie brought a Motion to Quash on behalf of Owens-Corning Fiberglas. I want to complete the record.

THE COURT: I am going to at this time for the purposes of the record deny your Motion and for the reason that the Court believes it doesn't have jurisdiction over the individuals among others.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CHARLES ANDERSON, et al.	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 91-L-620-625
	)	90-L-1546
OWENS-CORNING FIBERGLAS	)	
CORPORATION, et al.,	)	
	)	
Defendants.	)	

ORDER REGARDING PLAINTIFF'S 237(b) NOTICES, DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND DEFENDANT'S MOTION TO QUASH

The Court, being fully advised in the premises, pursuant to Supreme Court Rule 237, hereby orders that Defendant, OWENS-CORNING FIBERGLAS CORPORATION, produce the following individuals:

1. Glen Hiner, the Chief Executive Officer of Owens-Corning Fiberglas Corporation, for purposes of determining the "net worth" and financial status of the corporation and other issues regarding punitive damages.

2. Mr. Devario, the Chief Financial Officer of Owens-Corning Fiberglas Corporation, for purposes of determining the "net worth" and financial status of the corporation and other issues regarding punitive damages.

3. Robert McComber, in-house counsel for Owens-Corning Fiberglas Corporation who has previously answered interrogatories on behalf of Owens-Corning Fiberglas Corporation on substantive issues.

4. Duane Calender, in-house counsel for Owens-Corning Fiberglas Corporation, who has previously answered interrogatories on behalf of Owens-Corning Fiberglas Corporation on substantive issues.

Defendant, Owens-Corning Fiberglas Corporation, and Attorney Solotorovsky has lead the Court to believe that none of the four individuals will appear before this Court. The Court orders that Owens-Corning Fiberglas provide the Court with a definitive answer at 12:00 Noon on March 6, 1992, whether or not Owens-Corning Fiberglas Corporation will produce these gentlemen for trial purposes.

If Owens-Corning Fiberglas Corporation refuses to produce these individuals, the Court is placing Owens-Corning Fiberglas Corporation on notice that it may impose sanctions on Owens-Corning Fiberglas Corporation for its wilful and deliberate non-compliance with Supreme Court Rule 237.

Given the above ruling, the Court denies Owens-Corning Fiberglas Corporation's Motion for a Protective Order and Owens-Corning Fiberglas Corporation's Motion to Quash Plaintiffs' Supreme Court Rule 237 Notices.

DATED: March 5, 1992

ENTER: George J. Moran, Jr.
JUDGE

SUPREME COURT OF ILLINOIS
COURT CONVENED AT 9:00 A.M.
THURSDAY, MARCH 12, 1992

THE COURT MADE THE FOLLOWING ANNOUNCEMENTS:

No. 73344 - Owens-Corning Fiberglas Corp., petitioner, v. Hon. George J. Moran, Jr., Judge of the Circuit Court of Madison County, et al., respondents.

Motion by petitioner for leave to file a petition for an original writ of mandamus/prohibition or for the supervisory order. Motion *denied*.

No. 73359 - Glen H. Hiner et al., petitioners, v. Hon. George J. Moran, Jr., Judge of the Circuit Court of Madison County, et al., respondents.

Motion by petitioners for leave to file a petition for an original writ of mandamus/prohibition or for a supervisory order. Motion *denied*.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

M. OVETA PICKERING, as Special Administrator of ARVEL Pickering, Deceased, CHARLES ANDERSON, DONALD DOSSETT and CARL OSTERMAN,	)	90-L-1546 91-L-621 91-L-623 91-L-622
Plaintiffs,	)	
v.	)	
OWENS-CORNING FIBERGLAS CORP., et. al,	)	
Defendants.	)	

ORDER

This cause having come before the Court on Plaintiffs' Motion for Sanctions, and the Court being fully advised of the premises herein, FINDS:

that Owens-Corning Fiberglas Corporation, in open Court, has stated that it will not comply with this Court's Order of March 5, 1992, directing Owens-Corning Fiberglas Corporation to produce certain of its officers to testify at trial in this matter;

that Owens-Corning Fiberglas Corporation's refusal to comply with said Order of March 5, 1992, is wilful and in complete disregard of the Court's authority;

that Owens-Corning Fiberglas Corporation has been advised of the consequences of refusing to comply and given every opportunity to comply;

that pursuant to Chapter 110A, Paragraphs 219 and 237, this Court has the authority to impose sanctions against Owens Corning Fiberglas Corporation for such wilful disregard of the court's authority, including striking Owens Fiberglas Corporation's pleadings, entering default judgment against Owens Corning Fiberglas and awarding attorneys fees.

IT IS THEREFORE ORDERED: that Plaintiffs' Motion for Sanctions is hereby granted, and:

that Owens Corning Fiberglas Corporation's pleadings are hereby stricken and all allegations of Plaintiffs' Complaints are deemed admitted;

that Plaintiffs shall present a prima facia case on all liability issues, including whether Plaintiffs or Plaintiff's decedent suffer, or suffered, from an asbestos-related disease; this Court reserves ruling on entering default against Owens Corning Fiberglas Corporation on all liability issues pending presentation of said prima facia case;

that Plaintiffs shall present a case on all damage issues, both compensatory and punitive, which shall include the issue of whether Plaintiffs or Plaintiff's decedent suffer, or suffered from an asbestos-related disease;

that Owens Corning Fiberglas Corporation shall not be permitted to cross-examine Plaintiffs' witnesses or to present evidence on any liability issue;

that Owens Corning Fiberglas Corporation may cross-examine Plaintiffs' witnesses and present evidence on all damage issues, both compensatory and punitive, including the issue of whether

Plaintiffs or Plaintiff's decedent suffers, or suffered from an asbestos-related disease;

that Owens Corning Fiberglas Corporation, because it has refused to produce corporate witnesses requested by Plaintiffs pursuant to rule 237(b), may present no witnesses on its behalf who are currently or formerly officers, directors, or employees of Owens Corning Fiberglas Corporation; this shall not include expert witnesses retained by Owens Corning Fiberglas Corporation, who are not regularly within its employ;

that Plaintiffs may utilize expert testimony to establish the net worth of Owens Corning Fiberglas Corporation, and that Owens Corning Fiberglas Corporation may present no evidence on the issue of its net worth;

that Plaintiffs' Motion for Costs and Attorneys' Fees incurred in connection with Owens-Corning Fiberglas Corporation's Motion to Quash the Rule 237(b) Notices and all appeals therefrom and the Motion for sanctions is hereby granted; at the conclusion of trial, Plaintiffs shall present evidence to the Court as to the amount of such attorneys' fees, and the Court will determine at that time the precise amount awarded.

The Court at this time declines to hold Owens-Corning Fiberglas in contempt or to impose any fine pursuant thereto, but reserves the right to do so at a later time.

This is not a final and appealable Order.

ENTERED: This 17th day of March, 1992.

George J. Moran,
Circuit Judge

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

M. OVETA PICKERING, as Special Administrator of the estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN, DONALD DOSSETT,	)	90-L-1546 91-L-621 91-L-623 91-L-622
Plaintiffs,	)	
v.	)	
OWENS-CORNING FIBERGLAS CORP., et. al,	)	
Defendants.	)	

ORDER

This matter comes before the Court on Plaintiffs' Motion to enter a default judgment on all liability issues against Defendant Owens-Corning Fiberglas Corporation, pursuant to this Court's prior Order of March 17, 1992 imposing sanctions against Defendant Owens-Corning Fiberglas Corporation. The Court, having heard the evidence presented by Plaintiffs in their prima facia case on liability against Defendant Owens-Corning Fiberglas Corporation and having considered the proof offered to the Court by Owens-Corning Fiberglas Corporation, and being fully advised of the premises herein, FINDS:

> that on March 17, 1992, this Court imposed sanctions against Defendant Owens-Corning Fiberglas Corporation for its willful refusal to produce certain officers to testify in

this matter pursuant to Court Order, which sanctions included *inter alia*, striking the pleadings of Owens-Corning Fiberglas Corporation;

that the Court reserved the issue of whether a default judgment should be entered against Owens-Corning Fiberglas Corporation on all liability issues pending presentation by Plaintiffs of a prima facia case on the issues of liability;

that Plaintiffs have presented evidence sufficient to establish such prima facia case, as follows:

(1) that Owens-Corning Fiberglas Corporation manufactured, sold and distributed Kaylo pipecovering and block, which contained respirable asbestos fibers having a toxic, poisonous and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them. Accordingly, Defendant Owens-Corning Fiberglas Corporation had a duty to exercise reasonable care and caution for the safety of those working with and around said asbestos containing products;

(2) that it was completely foreseeable and should have been anticipated by Owens-Corning Fiberglas Corporation, that persons working with or around said asbestos-containing products, including Plaintiffs and Plaintiff's Decedent, would be exposed to said asbestos fibers;

(3) that Owens-Corning Fiberglas Corporation knew, or should have known, that the asbestos fibers contained in its products had a toxic, poisonous and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them;

(4) that Owens-Corning Fiberglas Corporation failed to exercise ordinary care and caution for the safety of the Plaintiffs and Plaintiff's Decedent in that: it included asbestos in its products, even though it was completely foreseeable and should have been anticipated that persons, such as Plaintiffs and Plaintiff's Decedent, working with or around them, would inhale, ingest and otherwise absorb great amounts of that asbestos; it included asbestos in its products when it knew or should have known that said asbestos fibers would have a toxic, poisonous and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them; it included asbestos in its products when adequate substitutes for the asbestos in them were available; it failed to provide any or adequate warnings to persons working with or around the products of the dangers of inhaling, ingesting or otherwise absorbing the asbestos fibers contained in them; it failed to provide any or adequate instructions concerning the safe methods of working with and around the products, including specific instructions on how to avoid inhaling, ingesting or otherwise absorbing the asbestos fibers in them; it failed to conduct tests on the asbestos containing products manufactured, sold and distributed by it in order to determine the hazards to which workers might be exposed while working with its product;

(5) that the acts and omissions of Owens-Corning Fiberglas Corporation rise to the level of wilful and wanton misconduct in that: it intentionally and with a reckless disregard for the

safety of the Plaintiffs and Plaintiff's Decedent, included asbestos in its products, even though it was completely foreseeable and should have been anticipated that persons, such as the Plaintiffs and Plaintiff's Decedent, working with or around them would inhale, ingest and otherwise absorb great amounts of that asbestos; it intentionally and with a reckless disregard for the safety of Plaintiffs and Plaintiff's Decedent included asbestos in its products when the Defendant knew that said asbestos fibers would have a toxic, poisonous and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them; it intentionally and with a reckless disregard for the safety of Plaintiffs and Plaintiff's Decedent included asbestos in its products when adequate substitutes for the asbestos in them were available; it intentionally and with a reckless disregard for the safety of the Plaintiffs and Plaintiff's Decedent failed to provide any or adequate warnings to persons working with and around its products of the dangers of inhaling, ingesting or otherwise absorbing the asbestos fibers in them; it intentionally and with a reckless disregard for the safety of the Plaintiffs and Plaintiff's Decedent failed to provide any or adequate instructions concerning the safe methods of working with and around the products, including specific instructions on how to avoid inhaling, ingesting or otherwise absorbing the asbestos fibers in them; and it intentionally and with reckless disregard for the safety of the Plaintiffs and Plaintiff's Decedent, failed to conduct tests on the asbestos containing products it manufactured, sold and distributed in order to

determine the hazards to which workers might be exposed while working with the products.

(6) that during the time periods which they were employed at the Clark Oil Refinery in Wood River, Illinois, Plaintiffs and Plaintiff's Decedent worked with and/or around Kaylo pipecovering and block, and were directly exposed to, inhaled, ingested and absorbed, airborn [*sic*] asbestos from said Kaylo with sufficient frequency and duration to have contracted an asbestos-related disease, which exposure was a direct and proximate result of Owens-Corning Fiberglas Corporation's negligent and wilful and wanton acts and omissions.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

that judgment by default is hereby entered against Owens-Corning Fiberglas Corporation on the issue of liability as to all counts of Plaintiffs' Complaints, both in negligence and willful and wanton misconduct;

that the issue of compensatory damages, including whether each Plaintiff suffers, and whether Plaintiff's Decedent suffered, from an asbestos-related disease will be submitted to, and decided by, the jury; in accordance with Illinois law, this Court will determine, at the close of all evidence, whether there is sufficient evidence to submit the issues of punitive damages to the jury;

that, pursuant to the March 17, 1992 Order imposing sanctions and because awarding punitive damages is discretionary with the jury even if willful and wanton misconduct is proved, Owens-Corning Fiberglas Corporation may present evidence on the issue of whether its conduct was wilful and

wanton (within the parameters of the March 17, 1992 Order) following a verdict in *Pickering*;

that, if Owens-Corning Fiberglas Corporation relents in its refusal to produce Mr. Heiner and Mr. Daverio to testify concerning its net worth, this Court may reconsider and modify its sanction Order, and permit Owens-Corning Fiberglas Corporation to present evidence of its net worth.

This Order is entered pursuant to the Court's March 17, 1992 Order imposing sanctions, and does not alter, amend or modify said Order in any way. The Court has, throughout the presentation of Plaintiffs' evidence, advised Owens-Corning Fiberglas Corporation that the Court would entertain a motion to modify its Order imposing sanctions, if Owens-Corning Fiberglas Corporation relented in its refusal to comply with this Court's Order pursuant to Rule 237(b). Owens-Corning Fiberglas Corporation has not done so.

This is not a final and appealable Order.

DATED: March 31, 1992

George J. Moran,
Circuit Judge

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CHARLES ANDERSON, DONALD DOSSETT and CARL OSTERMAN,	)	
Plaintiffs,	)	
	)	No. 91-L-621
v.	)	91-L-622
	)	91-L-623
OWENS-CORNING FIBERGLAS CORP.,	)	
Defendant.	)	

ORDER

Upon this Court's finding that Defendant, Owens-Corning Fiberglas Corp., has failed to comply with this Court's Order dated April 1, 1992 wherein Defendant was ordered to produce certain financial statements of Owens-Corning Fiberglas Corp. to Plaintiffs for purposes of calculating Defendant's net worth, Plaintiffs are hereby granted leave to amend their complaints to allege that the net worth of Owens-Corning Fiberglas Corp. is $1.5 billion. It is further ordered that Plaintiffs' allegations of Defendant's net worth is [*sic*] hereby deemed admitted, that Plaintiff's [*sic*] are allowed to

present a prima facie case as to Defendant's net worth, and Defendant is prohibited from contesting the issue of net worth.

Date 4-3-92

George J. Moran, Jr.
Judge

Jury Charge on Punitive Damages

The Court has already found that Owens-Corning Fiberglas Corporation's conduct was wilful and wanton and proximately caused any injury you may find Plaintiffs have suffered. Therefore, if you find that any or all of the Plaintiffs, Charles Anderson, Donald Dossett, and Carl Osterman, suffered from an asbestos-induced disease, and if you believe that justice and the public good require it, you may, in addition to any damages to which you find such Plaintiff or Plaintiffs entitled, award an amount which will serve to punish Owens-Corning Fiberglas Corporation and to deter others from the commission of like offenses. [R. C4746.]

If you decide that the interests of justice and public good warrant the assessment of punitive damages against Owens-Corning Fiberglas Corporation, you may consider the net worth of Owens-Corning Fiberglas Corporation in determining what, if any, amount of punitive damages would be sufficient to punish Owens-Corning Fiberglas Corporation and to deter others from like offenses.

The Court has found, and you shall accept as a fact, that the net worth of Owens-Corning Fiberglas Corporation is $1.5 billion ($1,500,000,000.00) dollars. [R. C4747.]

* * * *

MR. RASMUSSEN: Your Honor, also I object to — you made comments in the — in the jury instructions about punitive damages. You said that the jury might award under the law any amount you feel is appropriate. I think that was in addition improper addition to the jury instructions. I think that gives the jury a roving commission to find damages, and I think that that is

— it's not only unconstitutional in that it does not give the jury any guidance as to the finding of punitive damages; it — it left the jury I believe here with a supplement to the agreed upon, excuse me, to the read jury instructions and let the jury think that they could award anything they felt was appropriate. And I think that that was an erroneous instruction and I wanted to object to it.

MR. BONO: The Judge could have told them my figures, but he didn't.

THE COURT: Well, I just —

MR. BONO: I think — I think —

THE COURT: That's the way I have always instructed the jury trial — the jury, and really what I'm telling the jury is to — is to fill in the blanks whatever amount they feel is appropriate under the law, and I think I said that on all the blanks.

MR. BONO: That's an appropriate standard too, Judge.

THE COURT: Anyway overruled. [4/8/92 Tr. at 193-94.]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased,	)	
Plaintiff,	)	NO. 90-L-1546
vs.	)	
OWENS-CORNING FIBERGLAS CORPORATION,	)	
Defendant.	)	

JUDGMENT

This matter having come before the Court on the verdict rendered in favor of Plaintiff, MARY OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, and against Defendant, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $2,791,971.45 compensatory damages, and the Court being advised and finding Mary Oveta Pickering has received settlements in this matter totalling $123,228.33;

THE COURT HEREBY ENTERS JUDGMENT IN FAVOR OF PLAINTIFF, MARY OVETA PICKERING, SPECIAL ADMINISTRATOR OF THE ESTATE OF ARVEL PICKERING AND AGAINST DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $2,668,743.12 compensatory damages, with statutory post-judgment

interest of nine percent (9%) per annum to run from the date of entry.

DATED: 4/13/92

ENTER: George J. Moran, Jr.
JUDGE

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CHARLES ANDERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	NO. 91-L-621
OWENS-CORNING	)	
FIBERGLAS	)	
CORP.,	)	
	)	
Defendant.	)	
	)	
	)	

JUDGMENT

This matter having come before the Court on the verdict rendered in favor of Plaintiff, CHARLES ANDERSON, and against Defendant, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $102,500 compensatory damages and $2,500,000 punitive damages, and the Court being advised and finding that Charles Anderson has received settlements in this matter totalling, $40,233.33;

THE COURT HEREBY ENTERS JUDGMENT IN FAVOR OF PLAINTIFF, CHARLES ANDERSON, AND AGAINST DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $62,266.67 compensatory damages and $2,500,000 punitive damages, with statutory post-

judgment interest of nine percent (9%) per annum to run from the date of entry.

DATED: 4/13/92

ENTER: George J. Moran, Jr.
JUDGE

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CARL OSTERMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	NO. 91-L-622
OWENS-CORNING	)	
FIBERGLAS	)	
CORP.,	)	
	)	
Defendant.	)	
	)	
	)	

JUDGMENT

This matter having come before the Court on the verdict rendered in favor of Plaintiff, CARL OSTERMAN, and against Defendant, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $255,000 compensatory damages and $2,500,000 punitive damages, and the Court being advised and finding that Carl Osterman has received settlements in this matter totalling $40,233.33;

THE COURT HEREBY ENTERS JUDGMENT IN FAVOR OF PLAINTIFF, CARL OSTERMAN, AND AGAINST DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $214,766.67 compensatory damages and

$2,500,000 punitive damages, with statutory post-judgment interest of nine percent (9%) per annum to run from the date of entry.

DATED: 4/13/92

ENTER: George J. Moran, Jr.
JUDGE

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DONALD DOSSETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	NO. 91-L-623
OWENS-CORNING	)	
FIBERGLAS	)	
CORP.,	)	
	)	
Defendant.	)	
	)	
	)	

JUDGMENT

This matter having come before the Court on the verdict rendered in favor of Plaintiff, DONALD DOSSETT, and against Defendant, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $138,000 compensatory damages and $2,500,000 punitive damages, and the Court being advised and finding that Donald Dossett has received settlements in this matter totalling $40,233.33;

THE COURT HEREBY ENTERS JUDGMENT IN FAVOR OF PLAINTIFF, DONALD DOSSETT, AND AGAINST DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION, in the amount of $97,766.67 compensatory damages and

$2,500,000 punitive damages, with statutory post-judgment interest of nine percent (9%) per annum to run from the date of entry.

DATED: 4/13/92

ENTER: George J. Moran, Jr.
JUDGE

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased,	)	Nos. 90-L-1546
CHARLES ANDERSON,	)	91-L-621
CARL OSTERMAN,	)	91-L-622
DONALD DOSSETT,	)	91-L-623
Plaintiffs,	)	
v.	)	
OWENS-CORNING FIBERGLAS CORPORATION,	)	
Defendant.	)	

OWENS-CORNING FIBERGLAS CORPORATION'S
POST-TRIAL MOTION FOR DIRECTED VERDICTS,
OR IN THE ALTERNATIVE, FOR JUDGMENTS
NOTWITHSTANDING THE VERDICTS,
OR IN THE ALTERNATIVE, FOR NEW TRIALS,
OR, IN THE ALTERNATIVE, FOR REMITTITURS

. . . .

9. The trial court erred to the prejudice of defendant OCF in denying OCF's motion to quash plaintiffs' Rule 237(b) notices demanding that Glen H. Hiner, Paul V. Daverio, Duane C. Callender and Robert A. McOmber be produced at trial, and in imposing sanctions on OCF for its refusal to compel those individuals to appear at trial in response to said Rule 237(b) notices. *See* accompanying Memorandum in Support of Post-Trial Motion.

First, plaintiffs failed to show "good cause" for requiring any of these individuals to appear. Second, the trial court's construction of Rule 237(b) violates both Illinois and federal due process principles.

. . . .

46. The court should grant defendant OCF directed verdicts, enter judgments in OCF's favor notwithstanding the verdicts, or, alternatively, order new trials or remittiturs, on the issue of punitive damages and damages for allegedly wilful and wanton conduct, as to plaintiff Charles Anderson, plaintiff Carl Osterman, and plaintiff Donald Dossett. The grounds for this request are as follows:

. . . .

I. The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Art. 1, §§ 2, 12 of the Illinois Constitution are violated because the imposition of multiple punitive damages subjects OCF to multiple punishments, damages, and fines for the identical conduct. The same jury awarded multiple punitive damages awards for OCF's same course of conduct. In addition, millions of dollars of punitive damages against OCF have already been awarded by juries in other cases. *See* McOmber affidavit. Furthermore, to avoid the imposition of multiple punitive damages awards, OCF is entitled to offset against any punitive damages awarded by the jury in these cases in an amount equal to prior punitive damages imposed against OCF, as reflected in the McOmber affidavit.

J. The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Art. 1, §§ 2, 12 of the Illinois Constitution are violated because the jury had total discretionary powers to award punitive damages, and adequate objective legal standards do not exist to guide and limit the jury's discretion in an appropriate fashion, thus

allowing an award of punitive damages to be irrational, unreasonable, arbitrary, and capricious and based on vague, unpredictable, conflicting, and purely subjective standards.

K. The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Art. 1, §§ 2, 12 of the Illinois Constitution are violated because the jury awarded punitive damages in amounts that are disproportionate and bear no reasonable relationship to the actual damages, the type of conduct, and OCF's mental state.

L. The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Art. 1, §§ 2, 12 of the Illinois Constitution are violated because the vague and inconsistent legal standards for the imposition of punitive damages deprive OCF of sufficient notice of the type of conduct and mental state upon which a punitive damage award may be based and the amount of the punitive damage award which could result from OCF's alleged misconduct.

M. The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Art. 1, §§ 2, 12 of the Illinois Constitution are violated because the guidelines, standards, procedures, and instructions for the imposition of punitive damages are ambiguous, indefinite, unreasonable, vague, uncertain, conflicting, purely subjective, and fundamentally unfair.

N. The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Art. 1, §§ 2, 12 of the Illinois Constitution are violated because the awards of punitive damages were not reasonably related to the conduct of the defendant, the financial status of the defendant, and the potential liability of defendant, as defined in *Hazelwood v. Illinois Central Gulf*, 140 Ill. App. 3d 703, 450 N.E.2d 1199 (Ill. App. 1983).

. . . .

P. The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Art. 1, §§ 2, 12 of the Illinois Constitution are violated because no objective limitations or standards have been established regarding the amount or severity of punitive damages awards.

. . . .

AA. The punitive damages awarded are excessive in violation of OCF's Due Process and Equal Protection rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 2, 12 of the Illinois Constitution, in that the awards are substantially in excess of four times the actual damages award, which is the outer limit identified in *Pacific Mutual Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN, DONALD DOSSETT	)	No. 90-L-1546 91-L-621 91-L-622 91-L-623
Plaintiffs,	)	
v.	)	
OWENS-CORNING FIBERGLAS CORPORATION,	)	
Defendant.	)	

ORDER

This matter having come before the Court on the Post-Trial Motion of Defendant Owens-Corning Fiberglas Corporation seeking, in the alternative, a directed verdict, judgment notwithstanding the verdict, a new trial or a remittitur in each of these four consolidated cases; and the Court having considered said Motion, the materials submitted in support thereof, Plaintiffs' Memorandum in Opposition, and the oral argument of counsel, and being fully advised of the premises herein, FINDS:

that there was sufficient evidence presented to the jury to support the verdicts and the amounts thereof, including punitive damages, and the evidence, when viewed in the light most favorable to the verdicts, does not overwhelmingly support a contrary determination;

that Defendant has asserted no alleged error or combination of alleged errors which is both clearly improper and prejudicial;

that the damages awarded, including punitive damages are reasonable, supported by the evidence and not obviously the result of passion or prejudice.

IT IS THEREFORE ORDERED:

(1) That in Cause No. 90-L-546, *M. Oveta Pickering v. Owens-Corning Fiberglas Corporation*:

(a) Defendant's motion for directed verdict is DENIED;

(b) Defendant's motion for judgment notwithstanding the verdict is DENIED;

(c) Defendant's motion for a new trial is DENIED;

(d) Defendant's motion for a remittitur is DENIED;

(2) That in Cause No. 91-L-621, *Charles Anderson v. Owens-Corning Fiberglas Corporation*:

(a) Defendant's motion for directed verdict, as to both compensatory and punitive damages, is DENIED;

(b) Defendant's motion for judgment notwithstanding the verdict, as to both compensatory and punitive damages, is DENIED;

(c) Defendant's motion for a new trial, as to both compensatory and punitive damages, is DENIED;

(d) Defendant's motion for a remittitur, as to both compensatory and punitive damages, is DENIED;

(3) That in Cause No. 91-L-622, *Carl Osterman v. Owens-Corning Fiberglas Corporation*:

(a) Defendant's motion for directed verdict, as to both compensatory and punitive damages, is DENIED;

(b) Defendant's motion for judgment notwithstanding the verdict, as to both compensatory and punitive damages, is DENIED;

(c) Defendant's motion for a new trial, as to both compensatory and punitive damages, is DENIED;

(d) Defendant's motion for a remittitur, as to both compensatory and punitive damages, is DENIED;

(4) That in Cause No. 91-L-623, *Donald Dossett v. Owens-Corning Fiberglas Corporation*:

(a) Defendant's motion for directed verdict, as to both compensatory and punitive damages, is DENIED;

(b) Defendant's motion for judgment notwithstanding the verdict, as to both compensatory and punitive damages, is DENIED;

(c) Defendant's motion for a new trial, as to both compensatory and punitive damages, is DENIED;

(d) Defendant's motion for a remittitur, as to both compensatory and punitive damages, is DENIED;

IT IS FURTHER ORDERED:

that Plaintiffs' contingent cross-motions for a new trial on claims for strict liability is moot, Defendant's Motion for Post-Trial relief having been denied; and,

that Plaintiff's cross-motion in Cause No. 90-L-546, *M. Oveta Pickering v. Owens-Corning Fiberglas* for a new trial on the issue of punitive damages is DENIED.

SO ORDERED

George J. Moran, Circuit Judge

Date: 9-15-92

SUPREME COURT OF ILLINOIS

TUESDAY, DECEMBER 6, 1994

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET ARE DISPOSED OF AS INDICATED:

. . . .

No. 77898 - M. Oveta Pickering, etc., et al., respondents, v. Owens-Corning Fiberglas Corporation, petitioner. Leave to appeal, Appellate Court, Fifth District. (5-92-0691)

Petition for leave to appeal denied.

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62706

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035
TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST
CHICAGO 60601
(312) 793-1332
TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(312) 793-1333

January 11, 1995

Ms. Ruth E. VanDemark
Attorney at Law
225 W. Washington St., S#2200
Chicago, IL 60606

Mr. Raymond F. Fournie
Attorney at Law
One Metropolitan Square, S#2600
St. Louis, MO 63102-2740

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 77898 - M. Oveta Pickering, etc., et al., respondents, v. Owens-Corning Fiberglas Corporation, petitioner.

Motion by petitioner to stay or recall the mandate of the Appellate Court, Fifth District, case No. 5-92-0691, pending disposition of the motion for leave to file a motion for reconsideration of the order denying petition for leave to appeal and any appeal to the United States Supreme Court. Motion *denied*.

JH/hc

cc: Mr. Randall Bono
Mr. David A. Novoselsky
Mr. Michael Brickman
Clerk of the Appellate Court, Fifth District

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62706

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035
TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST
CHICAGO 60601
(312) 793-1332
TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(312) 793-1333

January 23, 1995

Ms. Ruth E. VanDemark
Attorney at Law
225 W. Washington St., S#2200
Chicago, IL 60606

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 77898 - M. Oveta Pickering, etc., et al., respondents, v. Owens-Corning Fiberglas Corporation, petitioner.

Motion by petitioner for leave to file a motion for reconsideration of the order denying the petition for leave to appeal. Motion *denied*.

Motion by petitioner to strike objections filed by respondents to petitioner's motion for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion *denied*.

The mandate of this Court has issued today to the Appellate Court.

JH:lgr
cc: Mr. Raymond F. Fournie
Mr. Randall Bono
Mr. Michael Brickman

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court

Area Code 202
479-3011

January 27, 1995

Mr. Thomas Hungar
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Re: Owens-Corning Fiberglas Corporation
v. M. Oveta Pickering, et al.,
Application No. A-554

Dear Mr. Hungar:

The application for a stay [of] enforcement and execution of judgment pending the filing and disposition of a petition for certiorari in the above-entitled case has been presented to Justice Stevens, who on January 27, 1995 endorsed thereon the following:

"Deny
1/27/95
JPS"

Sincerely,

WILLIAM K. SUTER, Clerk

By

Cynthia Rapp
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC. 20543-0001

William K. Suter
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Thomas Hungar
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Mr. Randall Bono
65 East Ferguson Avenue
PO Box 128
Wood River, IL 62095

Mr. Michael Brickman
Ness, Motley, etc.
151 Meeting Street, Suite 600
Charleston, SC 29402

Mr. David Novoselsky
120 North LaSalle Street
Chicago, IL 60602

11093741

(2)

Supreme Court, U.S.
FILED
APR 5 1995
OFFICE OF THE CLERK

No. 94-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN, and DONALD DOSSETT,
Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENTS' BRIEF IN OPPOSITION

RANDALL A. BONO
MICHAEL R. BILBREY
PAMELA J. WISE
WILLIAM A. KOHLBURN
Bono, Goldenberg, Hopkins & Bilbrey, P.C.
65 East Ferguson Avenue
P.O. Box 128
Wood River, IL 62095

MICHAEL BRICKMAN
Ness, Motley, Loadholt, Richardson & Poole
151 Meeting Street
Suite 600
Charleston, SC 29402

DAVID A. NOVOSELSKY
(Counsel of Record)
David A. Novoselsky & Assoc.
120 North LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 346-8930

Counsel for Respondents

April 5, 1995

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

23 pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Petitioner Owens-Corning Fiberglas Corporation has waived and/or failed to preserve the arguments raised in its Petition that the punitive damages awards in three of these four cases are so grossly excessive as to violate due process.

2. Whether Illinois law with regard to punitive damages, as applied to this case, including the provision that the jury may consider evidence that defendant might be subject to multiple awards for the same misconduct, is consistent with the requirements of due process.

3. Whether there is no constitutional prohibition against compelling a corporation, over which the state court has jurisdiction, to produce officers, directors and/or employees, over whom the court has no jurisdiction, to testify at trial, where the witnesses themselves are not subject to sanction or contempt for failing to appear.

PARTIES

Petitioner Owens-Corning Fiberglas Corporation is a publicly held corporation.

Respondent M. Oveta Pickering is an individual and administrator of the estate of Arvel Pickering, deceased.

Respondents, Charles Anderson, Carl Osterman and Donald Dossett, are individuals.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
CONSTITUTIONAL PROVISION AND STATE SUPREME COURT RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	6
I.	
There Is No Colorable Challenge To The Constitutionality Of The Punitive Damages Awards	7
A. Certiorari Is Inappropriate Because OCF Has Waived Or Not Preserved Any Constitutional Error Relating To Punitive Damages	8
B. Illinois Punitive Damages Law, As Applied In The Case At Bar, Comports With Due Process	11
II.	
Ill.S.Ct. Rule 237(b) Is Not Unconstitutional	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	PAGE
BMW of North America v. Gore, 115 S.Ct. 932 (1995)	*passim*
Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	10, 11
Bellis v. United States, 417 U.S. 85 (1974)	16
Board of Regents v. Roth, 408 U.S. 564 (1972)	14
Coleman v. Thompson, 111 S.Ct. 2546 (1991)	9
Commodity Futures Trading Comm. v. Weintraub, 471 U.S. 343 (1985)	16
Deal v. Byford, 127 Ill.2d 192, 537 N.E.2d 267 (1989)	8
Hazelwood v. Illinois Central Gulf R.R., 114 Ill. App.3d 703, 450 N.E.2d 1199 (4th Dist. 1983)	11
Honda Motor Co., Ltd. v. Oberg, 114 S.Ct. 2331 (1994)	9, 11
International Longshoremen's Assoc. AFL-CIO v. Davis, 476 U.S. 380 (1986)	10, 11, 15
Johnson v. Owens-Corning Fiberglas Corp., 233 Ill. App.3d 425, 599 N.E.2d 129 (4th Dist.), *app. denied*, 147 Ill.2d 627, 606 N.E.2d 1227 (1992), *cert. denied*, 113 S.Ct. 2335 (1993)	7, 13
Kochan v. Owens-Corning Fiberglas Corp., 242 Ill. App.3d 781, 610 N.E.2d 683 (5th Dist.) *app. denied* 152 Ill.2d 561, 622 N.E.2d 1208 (1993), *cert. denied*, 114 S.Ct. 1219 (1993)	6, 7, 8, 9, 11
Oakview New Lenox Sch. Dist. v. Ford Motor Co., 61 Ill.App.3d 194, 378 N.E.2d 544 (3rd Dist. 1978)	13, 15

Owens-Corning Fiberglas Corp. v. Moran, 789 F. Supp. 286 (S.D. Ill.) *aff'd* 959 F.2d 634 (7th Cir. 1992) 4, 13

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 12

People ex rel. Hartigan v. Kennedy, 215 Ill.App.3d 880, 576 N.E.2d 107 (1st Dist. 1991) 14

Salvator v. Admiral Merchants Motor Freight, 175 Ill.App.3d 901, 503 N.E.2d 639 (4th Dist. 1988) . 14

Sochor v. Florida, 112 S.Ct. 2114 (1992) 8

Soto v. E.W. Bliss Div. of Gulf & Western Mfg., 116 Ill.App.3d 880, 452 N.E.2d 572 (1st Dist. 1983) 13, 15

TXO Production Corp. v. Alliance Resources, 113 S.Ct. 2711 (1993) 8, 9, 10, 11, 12

Yee v. City of Escondido, Calif., 112 S.Ct. 1522 (1992) 9, 15

Constitutional Provisions, Statutes and Rules

U.S. Const., Amend. XIV 2

Ill.S.Ct. Rule 237(b) ..... *passim*

735 ILCS 5/2-604.1 11

No. 94-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN, and DONALD DOSSETT,
Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Owens-Corning Fiberglas Corporation.

OPINION BELOW

These consolidated cases were brought in the Circuit Court for the Third Judicial Circuit of Madison County, Illinois. The opinion of the Illinois Appellate Court, Fifth District, was filed May 3, 1994 and is reported at 265 Ill.App.3d 806, 638 N.E.2d 1127 (5th Dist. 1994) [1a-30a].[1] The Appellate Court granted Owens-Corning Fiberglas Corporation's ("OCF") petition for rehearing and allowed it to supplement the Record on Appeal by filing the trial transcript [31a-32a]. After reviewing the transcript, by Order dated August 26, 1994, the Appellate Court ruled that its Opinion would stand as filed [33a-34a]. By Order dated December 6, 1994, the Supreme Court of Illinois denied OCF's Petition for Leave to Appeal which is reported at 158 Ill.2d 583 (1994) [69a]. Subsequently, in unreported orders, the Supreme Court of Illinois denied rehearing or reconsideration [70a-73a].

CONSTITUTIONAL PROVISION AND STATE SUPREME COURT RULE INVOLVED

United States Constitution, Amendment Fourteen, in pertinent part: "No State shall . . . deprive any person of life, liberty or property, without due process of law."

Illinois Supreme Court Rule 237(b), in pertinent part: "The appearance at trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. If the

---

[1] Citations to the Appendix are to the Petitioner's Appendix to the Petition for a Writ of Certiorari.

party or person is a nonresident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses.

STATEMENT OF THE CASE

The four consolidated cases, which are the subject of OCF's Petition, involve personal injury, illness and death resulting from exposure to asbestos from Kaylo, an insulation product manufactured, sold and distributed by OCF. As a result of their exposure, Arvel Pickering, Carl Osterman, Donald Dossett and Charles Anderson contracted asbestosis. Mr. Pickering died from asbestosis. At the time of this exposure, OCF knew that asbestos posed a hazard to human health. Yet, it deliberately, and with wanton disregard for the safety of these men and other workers, manufactured and marketed asbestos-containing insulation.

Trial began in these cases on March 3, 1992, in the Circuit Court for Madison County, Illinois. Plaintiffs, pursuant to Ill.S.Ct. Rule 237(b), served OCF with notices to produce four corporate officers to testify at trial. OCF moved to quash the notices, asserting that it was unconstitutional to compel OCF to produce corporate witnesses over whom the court had no personal jurisdiction. OCF also asserted, as a matter of state law, that the notices were burdensome and harassing. In support of its motion, OCF submitted affidavits from the four individuals setting forth facts concerning only personal jurisdiction. OCF submitted no evidence in support of its state law arguments. The four individuals entered a special appearance, through separate counsel, and filed

their own motion to quash the notices on constitutional grounds. Both motions to quash were denied.[2]

OCF then sought extraordinary relief in both state and federal court.[3] When this relief was denied, OCF refused to comply with the order that it produce the witnesses. By Order dated March 17, 1992, the trial court found that OCF's refusal to comply was "deliberate and in complete disregard of the Court's authority" [40a]. Accordingly, the trial court imposed sanctions against OCF. OCF's pleadings were stricken, and it was not permitted to introduce evidence or cross-examine witnesses with regard to liability issues. It was not permitted to present any evidence through corporate witnesses, but could otherwise contest all damage issues, *including punitive damages*. As a safeguard, Plaintiffs were required to present a *prima facie* case on the liability issues, and it was only after they had done so that any default was entered against OCF.

OCF was *not*, as it claims in its Petition, defaulted on the issue of punitive damages. The March 17, 1995 Order expressly states, "that [OCF] may cross-examine Plaintiffs' witnesses and present evidence on all damage issues, both compensatory and punitive" [41a]. The Order entering a default, dated March 31, 1992, states that

---

[2] The individuals never appealed from the denial of their separate motion to quash.

[3] OCF sought, and was denied, federal injunctive relief. *see Owens-Corning Fiberglas Corp. v. Moran*, 789 F.Supp. 286 (S.D. Ill.), *aff'd* 959 F.2d 634 (7th Cir. 1992). OCF was even cautioned, in the panel opinion authored by Judge Easterbrook, that there could be costs to placing exclusive reliance upon a questionable legal position and being wrong. *See* 959 F.2d at 636.

"because awarding punitive damages is discretionary with the jury even if wilful and wanton misconduct is proved, [OCF] may present evidence on the issue of whether its conduct was wilful and wanton" [47a-48a]. The punitive damages instructions also advised the jury that it was to decide whether or not to award punitive damages, and not merely what amount to award.[4]

The trial court also sanctioned OCF for refusing to comply with Plaintiffs' discovery requests concerning its financial status [49a]. OCF claimed to have a negative net worth, despite a market capitalization (number of outstanding shares times market price per share) of $1.5 billion. Because OCF refused to produce necessary information, the court, as a sanction, instructed the jury that OCF's net worth was $1.5 billion.

OCF objected to Plaintiffs' tendered instructions on punitive damages, but did not tender any punitive damages instruction of its own. At trial, OCF offered no evidence concerning the fact or possibility of multiple punitive damage awards against it in asbestos cases. OCF attempted, post-trial, to offer such evidence in the form of an affidavit.[5] The trial court properly refused to consider

---

[4] The first instruction stated, in pertinent part, "if you believe that justice and the public good require it, you *may*, in addition to any damages to which you find such Plaintiff or Plaintiffs entitled, award [punitive damages]" [51a] (*emphasis added*). The second instruction advised the jury that it could consider OCF's net worth "in determining what, *if any*, amount of punitive damages would be sufficient" [51a] (*emphasis added*).

[5] The affidavit, interestingly enough, was from Robert McOmber, one of the four witnesses whom OCF refused to produce at trial in response to plaintiffs' Rule 237(b) notice. OCF

(continued...)

information which had not been offered as evidence at trial.

OCF's post-trial motion and appeal raised the following constitutional challenges to the punitive damages awards: that the jury instructions were inadequate; that post-verdict review was insufficient; and that the awards were substantively excessive, in that they were disproportionate to the compensatory damages and failed to reflect the prospect of multiple awards for the same misconduct. OCF did not appeal the punitive damages awards on any state-law ground, including excessiveness. OCF also asserted, in its post-trial motion and on appeal, that it was unconstitutional to compel OCF to produce the four witnesses under Rule 237(b). OCF *never* argued to any court below—that the imposition of any sanction, including the instruction that its net worth was $1.5 billion, was itself unconstitutional; or that any sanction, including the instruction that its net worth was $1.5 billion, rendered the punitive damages awards unconstitutional.

REASONS FOR DENYING THE WRIT

Respondents respectfully submit, that OCF's Petition should be denied as to both questions raised. OCF has, in the past, sought and been denied certiorari on *precisely* these same two issues. *See Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill.App.3d 781, 610 N.E.2d 683 (5th Dist.), *app. denied*; 152 Ill.2d 561, 622, N.E.2d 1208

---

[5] (...continued)
had previously argued that McOmber had no knowledge relevant to the cases. Apparently, that was inaccurate.

(1993), *cert. denied*, 114 S.Ct. 1219 (1994) (refusing to consider identical constitutional challenge to award of punitive damages against OCF in asbestos case); *Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill.App.3d 425, 599 N.E.2d 129 (4th Dist.), *app. denied*, 147 Ill.2d 627, 606 N.E.2d 1227 (1992), *cert. denied*, 113 S.Ct. 2335 (1993) (refusing to accept constitutional challenge to Ill. S.Ct. Rule 237(b) in asbestos case). These issues are no more worthy of certiorari at this time, than they previously were in *Kochan* and *Johnson*.

Many of the arguments and issues, upon which OCF relies here, were waived or never presented below. Due to OCF's choice of trial tactics, this case is a procedural quagmire. OCF's repeated and deliberate refusal to obey court orders renders it impossible for this Court to even reach the issues raised by OCF in its Petition, without also deciding (or ignoring) several procedural issues which have no federal or constitutional significance.

I.

There Is No Colorable Challenge To The Constitutionality Of The Punitive Damages Awards

OCF's punitive damages position is replete with waiver and procedural defaults in the courts below. It attempts to raise new arguments, which were not presented to the courts below, in a transparent effort to make this case appear to be in line with *BMW of North America v. Gore*, 115 S.Ct. 932 (1995)—which it is not. OCF's arguments below were "identical" to those presented and rejected in *Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill.App.3d 781, 610 N.E.2d 683 (5th Dist.), *app. denied*, 152 Ill.2d 561, 622 N.E.2d 1208 (1993), *cert. denied*, 114 S.Ct. 1219

(1994). *See App. Ct. Op.*, at 23a ("[OCF] presented an identical argument to this court in [*Kochan*], where we rejected it, as we reject here"). This Court tacitly rejected those arguments by denying certiorari in *Kochan*, after having expressly rejected most of them in *TXO Production Corp. v. Alliance Resources*, 113 S.Ct. 2711 (1993). Respondents request that this Court do the same here.

A. Certiorari Is Inappropriate Because OCF Has Waived Or Not Preserved Any Constitutional Error Relating to Punitive Damages

This Court will not review "a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida*, 112 S.Ct. 2114, 2119 (1992) (failure to object to jury instruction precluded review). In the case at bar, the Appellate Court held, that OCF waived any error in the jury instruction on punitive damages by failing to tender an instruction of its own. *App.Ct. Op.*, at 23a-24a. Under *Deal v. Byford*, 127 Ill.2d 192, 537 N.E.2d 267, 271 (1989), which is cited below, the failure to tender an instruction waives *any* error in the punitive damages awards. There is, thus, "an adequate and independent state ground" for upholding the judgments—namely, waiver—and certiorari should be denied.

OCF offered no evidence at trial concerning its potential or actual exposure to multiple punitive damages awards in asbestos cases, although Illinois law expressly permits it to have done so. *See Kochan*, 610 N.E.2d at 828 (exposure to multiple punitive damages awards is a valid consideration, but defendant must present evidence to the jury). That failure constitutes another independent state-law ground for affirming the judgments, particular-

ly with regard to the issue of possible multiple awards, an issue in *BMW*.

Certiorari should also be denied because OCF by-passed state-court procedures, which it now argues led to a substantively unconstitutional result. *See Yee v. City of Escondido, Calf.*, 112 S.Ct. 1522, 1528-29 (1992) (declining to review constitutionality of procedure which petitioner by-passed). *See also TXO*, 113 S.Ct. at 2720 (if procedures are fair, there is a "strong presumption" that the judgment is valid). OCF offered no evidence relating to multiple awards and, also, asserted only constitutional errors with regard to punitive damages on appeal. Under Illinois law, evidence relating to multiple awards is admissible. An appellate court can reverse an excessive award of punitive damages or order a remitter, if it is the result of bias, passion or prejudice. *See Kochan*, 610 N.E.2d at 826-27.

In *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994), this Court held, that state courts were required to provide meaningful, substantive review of punitive damage awards. Both the majority and the dissenters, in *Honda Motors*, essentially agreed that the validity of a punitive damages award depends upon the fairness of the process as a whole, rather than any one aspect of the process. OCF's failure to utilize the whole process available under Illinois law—particularly appellate review—should, in these circumstances, preclude review by this Court.

Given these procedural defaults, it is unnecessary to retain this case pending a decision in *BMW*, because that decision will not affect these judgments. *See Coleman v. Thompson*, 111 S.Ct. 2546, 2554 (1991) ("if resolution of a federal question cannot affect the judgment, there is

nothing for [this] Court to do"). A remand in light of *BMW*, even on the issue of multiple awards, would not affect the judgements because OCF failed to offer evidence on that issue. Regardless of how *BMW* is decided, this case would be reaffirmed on that state-law ground.

In a desperate attempt to bring this case within the ambit of *BMW*, OCF has improperly raised new arguments which it never presented below. Such attempts should be rejected. *See Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (declining to consider constitutional challenges to punitive damages not raised below). OCF did not claim, below, that the punitive damages awards were unconstitutional because there was an excessive focus on evidence of wealth. *See* OCF Post-Trial Motion, ¶46, N at 63a (affirmatively arguing that financial status is necessary consideration). OCF also made no argument, below, that the punitive damages awards in this case should be compared to awards in similar cases, particularly to other asbestos judgments against OCF.

OCF's only *real* complaint with regard to financial status, was the manner in which it was determined—as a sanction for discovery violations with regard to financial information. That sanction involves a purely state-law issue over which this Court has no jurisdiction. *See International Longshoremen's Assoc. AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). Indeed, in *TXO*, this Court merely noted that the defendant's financial status had been determined by a discovery sanction. *See* 113 S.Ct. at 2716, n.9. OCF offered no evidence below in support of the claim that this "is both the largest total and the largest per capita judgment ever upheld against [OCF] after appeal in an asbestos case." *See* Petition, p.18. Its anecdotal references here to reported cases are unavail-

ing, given that OCF did not cite them to any court below. In any event, both of these arguments were rejected by this Court in *TXO*, 113 S.Ct. at 2723 (financial status may be considered), and at 2720 (comparison to other awards not required).

Additionally, OCF now suggests, that the sanctions imposed against it for disobeying court orders somehow render the punitive damages awards unconstitutional. OCF was *not* defaulted on punitive damages. OCF never argued that any sanction imposed against it was unconstitutional, or that any sanction rendered punitive damages unconstitutional. That includes the sanction, imposed for discovery violations, under which the jury was instructed that OCF's net worth was $1.5 billion. These are purely state-law issues, as to which no constitutional issue was raised and over which this Court has no jurisdiction. *See International Longshoremen*, 476 U.S. at 387; *Bankers Life*, 486 U.S. at 77.

B. Illinois Punitive Damages Law, As Applied In The Case At Bar, Comports With Due Process

This Court has declined to find any procedural infirmity in an award of punitive damages, where "traditional common law procedures were followed." *Honda Motors*, 113 S.Ct. at 2726 (Scalia, J., *concurring*). Indeed, the reversal of the award in *Honda Motors* was compelled by the *failure* to provide a traditional procedure. Illinois law not only provides all traditional procedures, it includes additional pre-trial protections under 735 ILCS 5/2-604.1 (requiring preliminary hearing on issue of punitive damages). *See Kochan*, 610 N.E.2d at 827; *Hazelwood v. Illinois Central Gulf R.R.*, 114 Ill.App.3d 703, 450 N.E.2d 1199 (4th Dist. 1983). OCF's challenges to the punitive

damages awards proceed from a misreading of this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), which was ultimately clarified in *TXO*, 113 S.Ct. 2711. Illinois law, as applied here, is consistent with *TXO*, and further review of these issues by this Court is unwarranted.

OCF's two arguments that the awards are substantially excessive, are equally meritless. This Court has never imposed a specific proportionality requirement. It did not do so in *Haslip*. *See* App.Ct. Op. at 25a-26a. As OCF acknowledges, this Court upheld a punitive damages award which was 526 times the compensatory damages in *TXO*. Indeed, *TXO* removes any suggestion, that due process compels some arbitrary mathematical ratio, and directs attention to the potential harm which could have resulted from the defendant's misconduct.[6] Regardless of whether or not it is compelled by due process, Illinois law already holds that the prospect of multiple punitive damages awards for the same misconduct is a valid consideration. It would be superfluous and advisory for this Court to grant certiorari, for the purpose of deciding whether or not due process requires what Illinois law already provides. Moreover, due to OCF's failure to offer admissible evidence on this issue at trial, the record here does not support consideration of this issue.

---

[6] *TXO*, also, correctly notes that compensatory damages may not always reflect potential harm. Given the compensatory damages award of $2.8 million in *Pickering* (where punitive damages were unavailable), the punitive damages awards of $2.5 million in each of the other three cases arguably bear *less* than a 1-to-1 ratio to the *potential* harm which could result from exposure to asbestos.

II.

Ill.S.Ct. Rule 237(b) Is Not Unconstitutional

OCF's constitutional challenge to Ill.S.Ct. Rule 237(b) borders on the frivolous. Illinois courts have consistently held that it is permissible, under Rule 237(b), to compel a corporation, over which the court has jurisdiction, to produce witnesses who, as individuals, are beyond the power of the court. *See Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill.App.3d 425, 599 N.E.2d 129 (4th Dist.), *app. denied*, 147 Ill.2d 627, 606 N.E.2d 1227 (1992), *cert. denied*, 113 S.Ct. 2335 (1993); *Oakview New Lenox Sch. Dist. v. Ford Motor Co.*, 61 Ill.App.3d 194, 378 N.E.2d 544, 547 (3rd Dist. 1978); *Soto v. E.W. Bliss Div. of Gulf & Western Mfg.*, 116 Ill.App.3d 880, 452 N.E.2d 572, 579 (1st Dist. 1983). In *Johnson v. OCF*, this Court denied certiorari on the very same constitutional issue OCF is attempting to present here. The United States Court of Appeals, Seventh Circuit, affirmed the denial of a federal injunction against the application of Rule 237(b) in this case, and admonished OCF for its blind adherence to a questionable constitutional argument. *See OCF v. Moran*, 959 F.2d 634, 636 (7th Cir. 1992).

The fatal flaw in OCF's position, then and now, is its inability to identify the specific right, which is supposedly being violated—or even to whom that right belongs. The rights of the individual witnesses are not at issue, because they were not subject to any sanction or deprivation. They did not even appeal here. OCF, itself, is subject to jurisdiction and can be compelled to act through its agents.

Due process, by the terms of the fourteenth amendment, protects against arbitrary or unfair deprivations. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). The prohibition against being hailed into a distant jurisdiction, upon which OCF relies, springs from the potential deprivation which might be occasioned by the entry of a judgment. Similarly, holding a witness in contempt for failing to appear directly impairs a protected individual interest. Illinois law expressly protects the individual interests of those named in a Rule 237(b) notice. Those individuals cannot be held in contempt *personally* for failing to appear. *See Salvator v. Admiral Merchants Motor Freight*, 175 Ill.App.3d 901, 503 N.E.2d 639 (4th Dist. 1988). Similarly, Illinois law holds that courts cannot acquire jurisdiction over a non-resident individual solely because of his position with a corporation, which is subject to jurisdiction. *See People ex rel. Hartigan v. Kennedy*, 215 Ill.App.3d 880, 576 N.E.2d 107 (1st Dist. 1991).[7] In the cases at bar, the trial court acknowledged that it had no jurisdiction over the individuals, and stated that no adverse consequences of any kind would befall them.

---

[7] OCF's suggestion, that it is but a short step from Rule 237(b) to allowing courts to compel a corporation to force employees to submit to jurisdiction, is a classic "slippery slope" fallacy. The possibility, that an otherwise legitimate power might be abused, does not render that power unconstitutional. It is, moreover, an insult to the integrity of the state courts to suggest that they cannot differentiate between the constitutional and unconstitutional. No doubt, the Illinois courts will continue to do what they have been doing—insure that the power of the courts under Rule 237(b) is directed to the corporation, not the individuals.

Because there is no violation of the individuals' rights, OCF's protracted discourse on state-action is irrelevant. State-action is a necessary element of a fourteenth amendment claim, but it is not sufficient by itself to sustain one. States can compel parties to a lawsuit to produce evidence, and nothing cited by OCF is to the contrary.

With regard to its own rights, OCF relies primarily upon the possibility that Rule 237(b) could be used to harass or burden large corporations. OCF cites no authority suggesting that this, or any other concern directly involving OCF, is protected by the Constitution. Such concerns reflect matters involving only state law. *See Longshoremen v. Davis*, 476 U.S. at 387 (no jurisdiction over state-law matters). In reality, Illinois law does prohibit using Rule 237(b) as a tool for harassment, and provides that a notice may be quashed upon a showing of the same. *See Soto*, 452 N.E.2d at 579; *Oakview*, 378 N.E.2d at 548. In the case at bar, OCF declined to submit any evidence on this issue and, therefore, failed to carry its burden. Once again, OCF is attempting to challenge the constitutionality of a state procedure, without having availed itself of the protections accorded it under Illinois law. It should not be permitted to do so. *See Yee*, 112 S.Ct. at 1528-29.

It is surely not the province of this Court to review every vague assertion of unfairness, such as OCF raises here. The real issue, is whether a corporation, as an artificial entity, can be compelled to act through the natural persons who are its agents. This Court has consistently recognized a legal difference between a person's acting in a corporate capacity, as opposed to an individual capacity, and held that individuals may be required to act on

behalf of a corporation, even where individual rights are threatened. *See Commodity Futures Trading Comm. v. Weintraub*, 471 U.S.343 (1985) (compelling corporate attorney to disclose privileged communications, despite officers' claims of individual privilege); *Bellis v. United States*, 417 U.S. 85 (1974) (custodian of records may be required to produce documents, even if doing so threatens individual protection against self-incrimination). Compelling a corporation to produce corporate witnesses to testify at trial is consistent with these authorities, and does not offend due process.

CONCLUSION

OCF wantonly poisoned four men (along with others) by marketing a product which it knew to be toxic. OCF employed trial tactics which involved filing numerous requests for extraordinary relief, including federal injunctions, and deliberately disobeying court orders. OCF neglected some basic matters, such as tendering jury instructions and preserving issues on appeal. OCF by-passed procedures, which it now claims led to unfair results. There is no clean, colorable constitutional issue for review. There is only the final plea of a disgruntled litigant, which decided, from the outset, to cry foul, rather than to play fair.

Accordingly, and for the reasons stated herein, Respondents respectfully request that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

RANDALL A. BONO
MICHAEL R. BILBREY
PAMELA J. WISE
WILLIAM A. KOHLBURN
Bono, Goldenberg, Hopkins
& Bilbrey, P.C.
65 East Ferguson Avenue
P.O. Box 128
Wood River, IL 62095

MICHAEL BRICKMAN
Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street
Suite 600
Charleston, SC 29402

DAVID A. NOVOSELSKY
(Counsel of Record)
David A. Novoselsky & Assoc.
120 North LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 346-8930

Counsel for Respondents

April 5, 1995

No. 94-1476

Supreme Court, U.S.
FILED
APR 13 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

LARRY L. SIMMS
THOMAS G. HUNGAR
Gibson, Dunn & Crutcher
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5306
(202) 955-8500

KAREN I. WARD
Owens-Corning Fiberglas Corporation
Building 53
2790 Columbus Road, Route 16
Granville, Ohio 43023-1200
(614) 321-5814

ANNE E. COHEN
(Counsel of Record)
JONATHAN E. RICHMAN
ROBERT D. GOODMAN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Petitioner

April 13, 1995

5 pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994
No. 94-1476

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

---

PETITIONER'S REPLY BRIEF

In its certiorari petition, Owens-Corning Fiberglas Corporation ("Owens-Corning") demonstrates that the $7.5 million punitive damages judgment is excessive under the Due Process Clause of the Fourteenth Amendment and urges the Court either to grant the petition to address that issue or to hold the petition pending disposition of *BMW of North America, Inc. v. Gore*, No. 94-896 (*cert. granted*, 115 S. Ct. 932 (1995)), which also presents issues

about the substantive due process limits on the size of a punitive damages award.

Respondents ("plaintiffs") have little to say about the substantive constitutional issues presented in this case and in *BMW*. Instead, they retort that the "decision [in *BMW*] will not affect" the judgment below, because Owens-Corning allegedly waived the constitutional excessiveness argument as a matter of Illinois law. [Cert. Opp. at 7-11.]

This "waiver" assertion is flatly wrong. Owens-Corning raised the due-process excessiveness issue in its post-trial motion [61a-64a[1]] and on appeal, and the Appellate Court of Illinois expressly addressed it on the merits in the decision from which certiorari is sought [23a, 25a-26a]. The Appellate Court's consideration of the substantive due process issue disposes of plaintiffs' "waiver" argument. *See, e.g., Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

Moreover, plaintiffs offer no explanation why the two acts of "waiver" they identify — Owens-Corning's not proffering proposed jury instructions to replace the pattern Illinois instructions, and its not presenting to the jury highly prejudicial evidence of prior punitive damages awards against it — should foreclose a constitutional challenge to the excessiveness of the punitive damages awards at issue here. While failure to present alternative jury instructions might waive an objection to the constitutionality of the instructions actually given, Owens-Corning's petition does not raise that separate *procedural* due process issue.

---

1. Citations refer to the appendix to Owens-Corning's petition for certiorari.

The fact that the jury did not hear evidence of other punitive damages awards also is irrelevant to Owens-Corning's right to challenge the size of a particular award on appeal. Evidence of prior or potential punitive damages awards was not presented to the juries in the *BMW* case, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), or *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), but the absence of that evidence did not prevent the Court from resolving the excessiveness challenges in *TXO* and *Haslip* or from granting certiorari on the substantive due process issue in *BMW*. In fact, under the Alabama punitive damages scheme upheld in *Haslip*, juries do *not* hear evidence of other punitive damages awards. That evidence is introduced only after the verdict, when a defendant files its post-trial motions. 499 U.S. at 21-22.

Finally, to the extent Illinois law on waiver is even relevant in light of the Appellate Court's having addressed the merits of the substantive due process argument, plaintiffs misstate that law in citing *Deal v. Byford*, 127 Ill. 2d 192, 537 N.E.2d 267, 271 (1989), for the alleged proposition that "the failure to tender an instruction waives *any* error in the punitive damages awards" [Cert. Opp. at 8]. *Deal* says no such thing. The Illinois Supreme Court ruled only that the defendants could not challenge the jury instructions and the consistency of the jury's answers to questions on the verdict form because the defendants had not properly objected or tendered their own proposals. But despite this waiver as to the jury instructions and the consistency of the answers on the verdict form, the Illinois Supreme Court nevertheless proceeded to address on the merits the defendants' "next" contention that "the jury's award of $25,000 in punitive damages to the plaintiff is excessive." 537 N.E.2d at 271-72. Plaintiffs' "waiver" argument thus is incorrect even under Illinois law.

In sum, plaintiffs' contrived "waiver" claim cannot shield the substantial constitutional issues presented in the petition either from plenary review or from a remand for reconsideration in light of the Court's forthcoming resolution of identical issues in *BMW*.

CONCLUSION

The Court therefore should grant Owens-Corning's petition for a writ of certiorari.

Respectfully submitted,

LARRY L. SIMMS
THOMAS G. HUNGAR
Gibson, Dunn & Crutcher
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

ANNE E. COHEN
(*Counsel of Record*)
JONATHAN E. RICHMAN
ROBERT D. GOODMAN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

KAREN I. WARD
Owens-Corning Fiberglas Corporation
Building 53
2790 Columbus Road, Route 16
Granville, Ohio 43023-1200
(614) 321-5814

Counsel for Petitioner

April 13, 1995